CIVILIAN PERSONNEL LAW MANUAL

SECOND EDITION * JUNE 1983/SUPPLEMENT 1984

UNITED STATES GENERAL ACCOUNTING OFFICE

OFFICE OF GENERAL COUNSEL

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FOREWORD

In June of 1983, the Second Edition of the Civilian Personnel Law Manual was issued. It reflects Comptroller General decisions of the General Accounting Office issued through September 30, 1982. We now issue the 1984 Supplement to the Second Edition of the Civilian Personnel Law Manual, covering Comptroller General decisions from October 1, 1982 to December 31, 1983.

The 1984 Supplement follows the same format as the Second Edition of the Civilian Personnel Law Manual--an Introduction and four titles: Title I-Compensation, Title II-Leave, Title III-Travel, and Title IV-Relocation. Each unit has been separately bound, but wrapped together for distribution purposes. Each unit of the 1984 Supplement can be filed with the corresponding unit of the Second Edition of the Civilian Personnel Law Manual.

As always, we welcome any comments that you have regarding any aspect of the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement. We hope that it will be a useful source of information concerning our personnel law decisions.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

April 1984

INTRODUCTION

PART I

Administrative basis of claims adjudications (3)

Record Retention (New)

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from the General Accounting Office. See, 44 U.S.C. § 3309. Retention of Time and Attendance Records, 62 Comp. Gen. 42 (1982).

Jurisdictional limitations and policy considerations (5)

Res judicata (New)

An employee sought a Comptroller General decision on his entitlement to salary retention. The General Accounting Office adheres to the doctrine of res judicata to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the General Accounting Office. 47 Comp. Gen. 573 (1968). Since in William C. Ragland v. Internal Revenue Service, Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits; the General Accounting Office did not consider his claim for salary retention. William C. Ragland, B-204409, May 23, 1983.

Foreign Service Grievance Board (New)

An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under former 22 U.S.C. § 1037a, for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to the General Accounting Office for review and decision. Under former 22 U.S.C. § 1037a(13), such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, the General Accounting Office is without jurisdiction to review the Board's decision in this case. Pierre L. Sales, B-212601, September 20, 1983, 62 Comp. Gen. ____ (1983). The Foreign Service Act of 1980, Pub. L. 96-465, § 2205(1), 94 Stat. 2071, 2159 (1980) repealed these provisions effective February 15, 1981.

Other substantive jurisdictional issues

Waiver of claims of U.S. for erroneous payments of pay and allowances (9)

A travel advance outstanding and not liquidated at the time of a former employee's retirement is not an overpayment of pay or allowances and, therefore, could not be considered for waiver under the authority of 5 U.S.C. § 5584. Under 5 U.S.C. § 5705, and given the Government's right as a creditor to use monies due the individual to reduce or extinguish a debt due the Government, expenses due the former employee for invitational travel performed subsequent to his retirement were subject to setoff against indebtedness for his unliquidated travel advance. Charles E. Clark, B-207355, October 7, 1982.

INTRODUCTION

PART II

GAO RESEARCH MATERIALS AND FACILITIES

GAO Civilian Personnel Law Manual (11)

Copies of the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement are available from the Superintendent of Documents, U.S. Government Printing Office, 941 North Capital Street, Washington, D.C. 20402. Further information regarding the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement may be obtained by contacting:

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Civilian Personnel Law Manual

Second Edition • June 1983/Supplement 1984
Title I • Compensation

OFFICE OF GENERAL COUNSEL

CHAPTER 1

CIVILIAN PAY SYSTEMS

C. SENIOR EXECUTIVE SERVICE

Performance awards (1-6)

Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. § 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____.

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. § 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. § 5383(b). If a bonus was paid by Treasury check dated on or after October 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before October 1, 1982. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ___.

Meritorious and Distinguished Executive Awards (1-6)

Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. § 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. § 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after October 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before October 1, 1982. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____.

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CHAPTER 3

BASIC COMPENSATION

SUBCHAPTER I -- COMPUTATION

B. BIWEEKLY PAY PERIODS AND HOURLY RATES (3-3)

Computation of pay -- statutory changes (New)

Effective with respect to pay periods beginning in fiscal years 1984 and 1985, and applicable in the case of an employee as defined in 5 U.S.C. § 5504(b) (1982), any hourly rate derived under 5 U.S.C. § 5504(b)(1) (1982) shall be derived by dividing the annual rate of basic pay by 2,087 rather than 2,080. This statutory change is applicable only during fiscal years 1984 and 1985, but is not applicable in determining basic pay for civil service retirement purposes. See § 310(b) of the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, 96 Stat. 763, 799 (1982), as amended by § 3(1) of the Act of October 15, 1982, Pub. L. 97-346, 96 Stat. 1647, 1649 (1982), 5 U.S.C. § 5504 note (1982).

In regard to members of the Senior Executive Service (SES), we note that under 5 U.S.C. § 5504(a) they are paid at biweekly intervals. They are not, however, included under the provisions of 5 U.S.C. § 5504(b) (1982) which establish the procedures for determining the hourly, daily, weekly, or biweekly rates of pay for all other employees paid on a biweekly basis, and no other statute establishes a method to compute their pay. By regulation, OPM has determined that SES members should have their pay computed in the same manner as other employees paid on a biweekly basis. See 5 C.F.R. § 534.404(a) and (b), as amended by 49 Fed. Reg. 2879 (January 24, 1984).

SUBCHAPTER II--ESTABLISHMENT OF COMPENSATION INCIDENT TO CERTAIN PERSONNEL ACTIONS

C. PROMOTIONS AND TRANSFERS (See also Chapter 7, Employee Make-Whole Remedies.)

Effective date

Exceptions (3-12)

Criteria for proper revocation of promotions before effective date (New)

Ten employees of Merit Systems Protection Board were selected for promotion effective December 13, 1981.

Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These 10 promotions were not properly revoked before they became effective and are retroactively effective on December 13, 1981. Eight employees of the Merit Systems Protection Board were selected for promotion effective December 27, 1981, or later. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These promotions were effectively revoked, even though written notification was not issued until December 29. There is no basis to allow retroactive promotions for these eight employees. Mitchell J. Albert, B-208406, July 15, 1983.

Highest previous rate rule

Agency regulation and policy (3-15)

Employee, who was serving in a temporary position following a reduction-in-force, was released by the agency when her temporary appointment expired. Employee was later reemployed by agency following a service break, in a grade previously held, but at step 1 of grade. Employee claims entitlement to retroactive step adjustment and backpay to step 9, the highest step of grade previously held. Use of highest previous rate is discretionary on agency's part, there being no employee-vested interest in that higher step upon reemployment in absence of regulation so providing. In view of existing agency policy that highest previous rate would only apply to reappointments without a service break, agency action was proper. Irene Sengstack, B-212085, December 6, 1983.

"Two-step increase" rule (3-23)

Promotion or transfer between General Schedule and other pay systems (New)

An employee hired by the Architect of the Capitol pursuant to 2 U.S.C. § 60e-2a is not entitled to have his salary calculated with reference to the "two-step increase" rule, 5 U.S.C. § 5334(b), when he is appointed to a General Schedule position with the Department of Energy. The "two-step increase" rule, 5 U.S.C. § 5334(b), pertains only to transfers and promotions within the General Schedule system, and employees hired by the Architect of the Capitol under 2 U.S.C. § 60e-2a are not within the General Schedule. Thus, employee's salary was correctly adjusted in accordance with the "highest previous rate" rule, 5 U.S.C. § 5334(a). Charles L. Steinkamp, B-208155, April 15, 1983.

E. GRADE AND PAY RETENTION

Decisions under the Civil Service Reform Act of 1978 (3-31)

Cost-of-living allowance (New)

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

Equivalent increase (New)

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. § 531.403 (1982). Eric E. Bahl, B-209414, December 7, 1983, 63 Comp. Gen. ____, reversing Eric E. Bahl, 62 Comp. Gen. 151 (1983).

Promotion in violation of merit system principles (New)

General Services Administration requests reconsideration of decision Paul W. Braun, B-199730, July 31, 1981, contending that Mr. Braun is entitled to grade retention under 5 U.S.C. § 5362. We sustain our July 31, 1981, decision and reject the agency's contention concerning grade retention. Mr. Braun is not entitled to grade retention because the Office of Personnel Management found his promotion to the GS-15 position to have been in violation of merit system principles and ordered GSA to cancel the improper promotion. Paul W. Braun, B-199730, January 18, 1983.

SUBCHAPTER III--STEP INCREASES

A. PERIODIC STEP INCREASES

Equivalent increase

Promotion following demotion (3-36)

Editor's Note: The cases cited in the main volume under this subsection arose before the Civil Service Reform Act of 1978).

Promotion following demotion--cases arising after the Civil Service Reform Act of 1978 (New)

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. § 531.403 (1982). Eric E. Bahl, B-209414, December 7, 1983, 63 Comp. Gen. ___, reversing Eric E. Bahl, 62 Comp. Gen. 151 (1983).

CHAPTER 4

ADDITIONAL COMPENSATION FOR CLASSIFICATION ACT POSITIONS

SUBCHAPTER I--PREMIUM PAY--OVERTIME

B. OVERTIME UNDER 5 U.S.C. § 5542

What are compensable hours of work

Actual work requirement (4-4)

Fitness for duty examination (New)

Although time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under FLSA, such time is not hours of work under 5 U.S.C. § 5542. David Ehrich, B-209768, July 15, 1983.

Military and court leave (4-5)

Decision denying claim of employee for overtime compensation for period he was away on military leave is reversed. Claim was denied because although overtime was regularly scheduled, it was not clear that employee would have been required to work the overtime involved. Newly submitted evidence shows that employee would have been required to work and his claim is therefore allowed. Howard L. Young, B-202864, September 2, 1983, reversing B-202864, August 10, 1982, cited at 4-5 in main volume.

While traveling

Within duty station (4-9)

Employees of Social Security Administration are not entitled to overtime compensation under 5 U.S.C. § 5542(b)(2), for time spent traveling in agency-hired buses from one district office to another during the New York City transit strike of April 1980 because all of the offices involved were within the employees' official duty station. Moreover, none of the conditions specified in 5 U.S.C. § 5542(b)(2)(B) were satisfied. Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

Lunch periods (4-25)

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

C. OVERTIME UNDER FLSA

GAO's authority under FLSA

Claims settlement (4-36)

OPM and FAA propose to settle approximately 2,500 backpay claims for FLSA overtime by paying a compromise amount instead of computing each employee's entitlement based on available Government records. We hold that, where FAA has the necessary records to compute individual backpay entitlements, it may not compromise claims against the United States in the absence of specific statutory authority to that effect. FAA Electronic Maintenance Technicians, B-200112, May 5, 1983.

Effective date of OPM exemption determination (4-37)

Army disputes entitlement of recruiting specialists to retroactive overtime payments under Fair Labor Standards Act (FLSA). Where employees were considered exempt by agency in 1974 but Office of Personnel Management ruled otherwise in 1979, employees are entitled to overtime pay retroactive to 1974, subject to the 6-year statute of limitations. The statute of limitations is tolled only by filing claims in this Office. Jon Clifford, B-208268, November 16, 1982.

Paid absences (4-39)

Lunch Periods (New)

The Office of Personnel Management has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was

established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no bona fide lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., for hours worked in excess of 40 in a week as no offset for lunch breaks may be made. John L. Svercek, 62 Comp. Gen. 58 (1982).

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et. seq. The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are bona fide--although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are bona fide. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

Fitness for Duty Examination (New)

Employee was ordered to undergo fitness for duty examination which involved tests in a hospital for a period of 3-1/2 days, and he claims overtime compensation for that period. Under 5 C.F.R. § 551.425(b) time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 et seq. However, when an employee is in a hospital for the examination, only the actual examination time is credited as hours of work and hours during which the employee is eating, sleeping, etc., are not creditable work hours. David Ehrich, B-209768, July 15, 1983.

Burden of proof, evidence (4-40)

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from GAO. See 44 U.S.C. § 3309. Where an

agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies. Retention of Time and Attendance Records, 62 Comp. Gen. 42 (1982).

Army questions sufficiency of evidence to support retroactive claims of overtime under FLSA. In the absence of official records, employee must show amount and extent of overtime by reasonable inference. Once employee has met the burden of proof, the burden shifts to the agency to rebut the evidence. Jon Clifford, B-208268, November 16, 1982.

Where agency has failed to record overtime hours as required by Fair Labor Standards Act, and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence. Frances W. Arnold, 62 Comp. Gen. 187 (1983).

Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive. Francis W. Arnold, 62 Comp. Gen. 187 (1983).

Traveltime

Outside/within working hours (4-41)

Employees of Social Security Administration are not entitled to overtime compensation under the FLSA for time spent

traveling in agency-hired buses from one district office to another during the New York City transit strike of April 1980 because such travel was home to work travel. The day's work ended before the buses were boarded and it is undisputed that no work and no preliminary or postliminary activities were performed while traveling or upon debarkation from the buses. Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

Effect of Panama Canal Treaty (New)

Panama Canal Commission requests a decision as to whether firefighters employed prior to October 1, 1979, are entitled to overtime pay under the Fair Labor Standards Act (FLSA). The Panama Canal Treaty and section 1231 of the Panama Canal Act state that prior employees transferred to the Commission shall have terms and conditions of employment which are generally no less favorable than prior terms and conditions. We hold that this clause requires continuation of FLSA overtime pay to Commission firefighters employed prior to October 1, 1979, since otherwise they would suffer a significant, protracted reduction in pay which would operate as a virtual nullification of the "grandfather" clause for them. Panama Canal Commission, B-205126, February 28, 1983.

D. COMPENSATORY TIME

Discretionary authority to grant overtime (4-45)

Joint submission from agency and union asks whether employees may receive compensatory time off for regularly scheduled overtime work. We hold that both law, 5 U.S.C. § 5543, and regulations, 5 C.F.R. § 550.114, preclude the granting of compensatory time off for overtime other than that which is irregular or occasional. Compensatory Time Off for Regularly Scheduled Overtime, B-212486, October 31, 1983.

Relationship to FLSA (New)

Two nonexempt employees of the Department of the Interior earned overtime for travel under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., but not under title 5, United States Code. Agency attempted to grant compensatory time off in lieu of paying overtime due to a need to conserve available funds. Since there is no authority for granting compensatory time off under the Fair

Labor Standards Act where entitlement to overtime pay accrues solely under the Act, a need to conserve funds does not serve as a basis to permit the granting of compensatory time off in lieu of paying the overtime compensation due. Matter of Barnitt, 58 Comp. Gen. 1 (1978) distinguished. Jacquelyn D. Cruce and Christopher F. Perry, B-207446, November 10, 1982.

Statutory authority for compensatory time off for religious holidays

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. § 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute. General Services Administration, 62 Comp. Gen. 587 (1983).

SUBCHAPTER II--OTHER PREMIUM PAY

A. NIGHT PAY DIFFERENTIAL

Approval requirements (4-51)

A Customs Service employee was assigned a long-term project lasting nearly 3 years in which a substantial amount of overtime was performed on an almost nightly basis. The fact that the supervisor did not specifically approve the employee's schedule in advance does not bar him from recovering night diffential pay. Considering the regularity of the night work, the long duration of is performance, and the knowledge of the Customs Service that it would be required, we hold that the work was regularly scheduled within the meaning of 5 U.S.C. § 5545(a) and is compensable at night pay rates. Frank Newell, B-208396, March 1, 1983.

B. HOLIDAY PAY (4-52)

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, 62 Comp. Gen. 622 (1983).

C. OVERTIME UNDER FLSA (4-36)

Firefighters (New)

See § 7(k) of FLSA, 29 U.S.C. § 207(k).

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

There is no basis for providing Federal firefighters who attend training with additional compensation where their entitlement to overtime compensation under the Fair Labor Standards Act is reduced due to a shorter tour of duty while attending the training. Overtime Compensation for Firefighters on Temporary Duty, B-211696, September 23, 1983.

G. OVERTIME COMPENSATION FOR SPECIFICALLY NAMED GROUPS OF EMPLOYEES

Customs Service

Computation (4-75)

Customs Inspectors in El Paso, Texas, who previously worked 8-hour shifts claim over-time for 26-month period they work-

ed 8-1/2-hour shifts. Based on the record before our Office, we conclude the plaintiffs are entitled to overtime where the agency has failed to establish that plaintiffs had a duty-free lunch break which may be offset against their claims. The agency failed to meet its burden of proof that a duty-free lunch period was established during the 8-1/2-hour shift where none existed during the 8-hour shift. It appears that lunch periods were scheduled and taken in the same manner when the 8-1/2-hour shift was in effect as when the 8-hour shift was used. Jose Najar, B-213012, November 3, 1983.

Aggregating separate periods of Overtime (New)

Customs Service requests decision whether an inspector's overtime assignments from 9:30 p.m. to 10:30 p.m. Sunday, and from 12:45 a.m. to 1:45 a.m. Monday, may be considered continuous so as to limit his overtime entitlement to 1/2 day's pay for each assignment. We conclude that under current Customs regulations the Monday assignment is not a continuation of the Sunday assignment, and the inspector is entitled to 1-1/2 days' pay for the Monday assignment. Customs Inspectors, B-210442, September 2, 1983.

Federal Aviation Administration (New)

Section 145 of Public Law 97-377, December 21, 1982, which amends 5 U.S.C. § 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to August 3, 1981, as were the original provisions of 5 U.S.C. § 5546a(a) added by subsection 151(a) of Public Law 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history support the view that the amendment made by section 145 is retroactively effective. Federal Aviation Academy Instructors, 62 Comp. Gen. 396 (1983).

SUBCHAPTER III--SEVERANCE PAY AND ALLOWANCES

A. SEVERANCE PAY

Reason for separation

Resignation prior to separation (4-81)

An employee who resigned after he had received only conditional notice that he would be transferred to another commuting area is not entitled to severance pay. Entitlement to severance pay requires that the resignation occur after the employee receives definite notice not depending on the occurence of future events, that he will be separated. There must also be compliance with all regulatory requirements, including the type of notice necessary, which does not include conditional notice. Francis H. Metcalfe, B-207614, December 9, 1982.

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. § 550.701(b)(2) (1982). Ivan Orton, 62 Comp. Gen. 171 (1983).

Reduction-in-force (New)

Certain Department of Housing and Urban development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. § 5533(a). HUD Employees, 62 Comp. Gen. 435 (1983).

Scope of commuting area (New)

Where an employee's claim for severance pay by reason of involuntary separation is based upon the contention that her position was moved to another commuting area, the employee must also establish that she was forced to relocate her residence because of that change in commuting areas. We will not question an agency's determination on commuting area or necessity of relocation unless that determination is arbitrary, capricious, or clearly erroneous. Here, claimant could not establish to the satisfaction of the agency that the change would compel the employee to change her residence to continue employment. We cannot say that the agency's determination was arbitrary, capricious, or clearly erroneous. Hence, claimant's resignation was not involuntary, and her claim for severance pay is denied. Vivian W. Spencer, B210524, June 6, 1983.

Computation of severance pay

Based on pay immediately preceding separation (4-86)

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board. HUD Employees, 62 Comp. Gen. 435 (1983).

Period of entitlement or amount (4-86)

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development Mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601, et seq. (Supp. III, 1979). Enrique Garcia, B-206352, October 1, 1982.

E. MISCELLANEOUS ALLOWANCES

Tropical differential (4-102)

Delay in civilian appointment of discharged service member (New)

Certain employees in Panama are entitled to tropical differential pay if they continuously occupy a position in Panama after discharge from military service. Under agency practice and interpretation of its regulations this requirement was satisfied despite a few days delay after military discharge before civilian employment. Evidently such delay was sometimes administratively unavoidable. However, tropical differential is denied a claimant who delayed his civilian appointment for 22 days to return to the United States for discharge and to transact personal business after military discharge. Richard W. DuMas, B-212352, December 23, 1983.

CHAPTER 5

PAYROLL DEDUCTIONS, DEBT LIQUIDATION, WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

SUBCHAPTER I--PAYROLL DEDUCTIONS AND WITHHOLDING

C. SOCIAL SECURITY AND MEDICARE TAX

Medicare tax (5-7)

Agency properly deducted Medicare tax from the final paycheck of an employee who retired in December 1982, but received the paycheck in January 1983, even though the employee is not eligible for Medicare benefits based on Federal Service. Section 278 of the Tax Equity and Fiscal Responsibility Act of 1982 provides that the tax applies to all remuneration received after December 31, 1982, but provides credit for pre-1983 Federal employment only to individuals who performed service both during January 1983 and before January 1, 1983. Although under these provisions some employees subject to the tax will not be eligible for Medicare benefits, there is nothing in the statute or its legislative history which permits a different result. Edward J. Compos, B-211960, November 29, 1983, 63 Comp. Gen. ____.

D. RETIREMENT (5-8)

Redeposit of contributions (New)

Under 5 U.S.C. 8334(d) payment of interest is required upon redeposit of contributions to the Civil Service Retirement Fund which were refunded to an employee. However, since the Office of Personnel Management has full authority to administer the Civil Service Retirement Act, any question regarding the conditions under which service may be credited for retirement purposes should be referred to that Office. Juan S. Griego, B-207176, January 6, 1983.

Refund of contributions (New)

In order to authorize a refund from the Judicial Survivors' Annuity Fund, other than for absolute retirement, there must be an express statutory provision. The Act of December 5, 1980, Pub. L. No. 96-504, Section 2, 94 Stat. 2741 (amending 5 U.S.C. 8344 (1976)), provides a legal mechanism to allow certain judicial officials the opportunity to reinvest into the civil service retirement plan within a set time. It does not authorize the refund of monies from the Judicial Survivors' Annuity Fund. Judge Gerard L. Goettel, February 11, 1983.

Salary computation for deductions (5-8)

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated on one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

K. GARNISHMENT (5-19)

The case of Employment Development Department v. United States Postal Service, 698 F.2d 1029 (9th Cir. 1983) appears to hold that postal (and federal) employees are shielded from wage garnishment by state tax collectors under 5 U.S.C. § 1755. However, the Supreme Court has noted probable jurisdiction in this case sub. nom. Franchise Tax Board of California v. United States Postal Service, No. 83-372, 52 U.S.L.W. 3509 (January 9, 1984).

SUBCHAPTER II--DEBT LIQUIDATION

F. ALIMONY AND CHILD SUPPORT (5-28)

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case under 5 U.S.C. 5582, the wife would also receive any money due the employee if he is deceased. Wesley E. Pitts, B-207015, December 14, 1982.

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. 1673(b), since under Office of Personnel Mangement Regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

SUBCHAPTER III--WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

C. WHAT CONSTITUTES COMPENSATION

Leave

Positive leave balance (5-32)

Employee's annual leave account was erroneously overcredited due to agency's error in calculating service computation date and, thus, the number of hours of leave she was to accrue each pay period. Waiver of the Government's claim to the overcredited annual leave is denied since there was a positive balance remaining in employee's leave account after agency adjusted the account to correct its administrative errors. Although agency erred in overcrediting leave and in delaying correction of the error, employee was also at fault for failing to inquire as to status of the correction. Bessie P. Williams, B-208293, August 15, 1983, affirming B-208293, January 26, 1983.

An employee who was credited excess annual leave because of administrative error must restore that leave to the extent that repayment does not result in a negative leave balance at the end of any leave year. If the employee used erroneously credited leave, repayment of the resulting overpayment of pay may be waived if it appears he did not know, or have reason to know, of the error. If records sufficient to establish the employee's leave record are not available for any period of time it may not be assumed that he used excess leave for purposes of establishing a debt and considering waiver. Thomas C. James, B-211881, December 9, 1983.

Military retired pay (5-34)

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government. 5 U.S.C. § 5532. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ___.

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances. 10 U.S.C. § 2774. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

D. EFFECT OF EMPLOYEE'S FAULT

Constructive notice--receipt of documents

Failure to deduct premiums

Life insurance premiums (5-40)

Employee elected regular and optional life insurance coverage under the Federal Employee's Group Life Insurance Program (FEGLI), but when he transferred in 1969, the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. § 5584. Frederick D. Crawford, 62 Comp. Gen. 608 (1983).

Employee not on notice of error (5-42)

As a result of administrative error, two Customs Service employees received premium pay for holiday work in addition to the overtime compensation to which they were entitled. Waiver of overpayments is proper even though agency's pay policies may be a matter of common knowledge because standards to be applied in making waiver determination require consideration of particular facts surrounding overpayment. There is no evidence that leave and earnings statements showed additional payments of holiday pay, and, therefore, it cannot be said that receipt of those documents constituted constructive notice of error. Additionally, a great deal of confusion existed in the payroll office servicing the employees involved, making it even more difficult to determine correctness of pay. Ronnie C. Sutton and John W. McKenzie, B-206385, December 6, 1982.

CHAPTER 6

RESTRICTIONS ON PAYMENT OF COMPENSATION BY THE UNITED STATES AND ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

SUBCHAPTER I--RESTRICTIONS ON PAYMENT OF COMPENSATION BY THE UNITED SATES

A. MISCELLANEOUS STATUTORY PROVISIONS

Holding two positions (6-1)

When an employee holding one position is appointed to another position in violation of dual compensation laws, a rebuttable presumption arises that the employee intended to give up his first position. The agency must determine from which position the erroneous payments arose. In any event, the indebtedness is owed to the United States, the collection of which is subject to waiver under 5 U.S.C. § 5584 (1976) and 4 C.F.R. Parts 91 and 92 (1982). Fort Benjamin Harrison, B-208336, April 22, 1983.

Extra Compensation

Prohibition (6-2)

Members of the Advisory Committee on Reactor Safeguards, Nuclear Regulatory Commission, a Committee established by the Atomic Energy Act, are appointed pursuant to said statute. The Nuclear Regulatory Commission is therefore without authority to enter into employment contracts with Committee members granting them monetary benefits beyond those provided by existing law and regulations. Advisory Committee on Reactor Safeguards, B-207515, October 5, 1982.

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours. Sergeant Richard P. Stevenson, USAF, B-207034, November 4, 1982.

B. LIMITATION ON DUAL COMPENSATION FROM MORE THAN ONE CIVILIAN OFFICE

Computation of 40-hour period (6-6)

Individual, who was working for non-appropriated fund activity, accepted a temporary full-time appointment in appropriated fund position and worked two jobs in excess of 40 hours per week. Employee has violated Dual Compensation Act, 5 U.S.C. § 5533(a), by working more than 40 hours per week in two "positions" as defined under section 5531(2). The test is not whether the positions are paid from appropriated funds, but whether the employee worked in "positions" as defined by the statute which expressly includes positions in a nonappropriated fund instrumentality of the armed forces. Fort Benjamin Harrison, B-208336, April 22, 1983.

E. STATUTORY CEILINGS OF COMPENSATION

Judicial branch positions (6-15)

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges I, 62 Comp. Gen. 54 (1982).

Question presented is entitlement of Federal judges to 4 percent comparability increase under section 129 of Public Law 97-377, December 21, 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of section 129(b) of Public Law 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges. Federal Judges II, 62 Comp. Gen. 358 (1983).

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically

authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges III, B-200923, December 28, 1983, 63 Comp. Gen. _____.

Limitation on pay fixed by administrative action (6-15)

Bureau of Engraving and Printing craft employees whose pay is set administratively under 5 U.S.C. § 5349(a), "consistent with the public interest," were properly limited to a 4 percent wage increase for fiscal year 1983. Although the pay increase limitation in the 1983 Appropriation Act did not apply to these Bureau employees, agency officials properly exercised their discretion by limiting pay increases consistent with the public interest in accordance with guidance issued by the Office of Personnel Management. Bureau of Engraving and Printing, B-211956, October 21, 1983.

Limitation on military retired pay (New)

Dual Compensation restrictions under 5 U.S.C. § 5532

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government, 5 U.S.C. § 5532. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances,

10 U.S.C. § 2724. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

Dual Compensation restrictions under 5 U.S.C. § 5532 note (1982) (New)

The deduction from civilian pay in the amount of increases in retired pay of a "member or former member of a uniformed service" as required by subsection 301(d) of the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253, September 8, 1982, 96 Stat. 763, 791, as amended by Public Law 97-346, October 15, 1982, 96 Stat. 1647, 1648, 5 U.S.C. § 5532 note (1982) is applicable to an individual who is a retired officer of an Army Reserve component. James F. Tierney, B-213231, December 16, 1983.

Limitation on Senior Executive Service Awards (New)

Performance awards

See Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____, digested above at Chapter 1, C.

Meritorious and Distinguished Executive Awards (New)

See Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____, digested above at Chapter 1, C.

SUBCHAPTER II--RESTRICTIONS ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

B. EMOLUMENTS FROM FOREIGN GOVERNMENTS (6-17)

Corporations (New)

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Article I, section 9, clause 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government. Lieutenant Colonel Marvin E. Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983).

CHAPTER 7

EMPLOYEE MAKE-WHOLE REMEDIES

B. BACK PAY ACT

Determinations regarding unjustified or unwarranted personnel actions

Reductions in force

Causal relationship to loss of pay (7-10)

Employee, whose temporary position expired, charges improper break in service caused her to lose the benefit of the highest previous rate rule when she was later reemployed at only step 1 of her prior grade. Our Office has no jurisdiction to consider her allegations that she was improperly denied appointment to another position or that her reemployment rights were violated. Such matters may be appealed to her employing agency or the Merit Systems Protection Board. Irene Sengstack, B-212085, December 6, 1983, 63 Comp. Gen. ____.

Nondiscretionary agency policy

Stated agency policy (7-14)

Agency asserts that its internal regulations which establish a policy to make temporary promotions for details mandatory after 30 days, was based on our early Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) sustained at 56 Comp. Gen. 427 (1977). Therefore, agency argues that after Turner-Caldwell III, 61 Comp. Gen. 408 (1982), which overruled prior Turner-Caldwell decisions, the agency's policy changed and its regulations did not require such temporary promotions. However, a reading of the applicable agency regulations show that no changes were made, and, therefore, we conclude on the basis of the agency's regulations that a nondiscretionary policy to grant temporary promotions for employees detailed to a higher-graded position for more than 30 days existed. Accordingly, the employee may be granted a retroactive temporary promotion beginning the 31st day of the detail. Howard A. Morrison, B-210917, August 10, 1983.

Federal Aviation Administration (FAA) questions overtime entitlement of certain air traffic controllers who were fired

but later restored retroactively. Although FAA contends there was no nondiscretionary policy governing the assignment of overtime, our decisions concerning overtime pay in backpay awards do not require such a policy. The overtime the controller normally would have worked during the period of separation should be determined by the FAA based upon prior overtime payments or upon overtime paid to similar employees who were not removed, and must be included in the backpay award. Ronald J. Ranieri, B-207977.2, August 23, 1983.

Retroactive change in initial appointments (7-18)

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded. Ladorn Creighton, 62 Comp. Gen. 343 (1983).

Premium pay

Overtime (7-21)

Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied. Kenneth L. Clark, 62 Comp. Gen. 370 (1983).

Awards (7-22)

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back-pay under 42 U.S.C. §2000-16(b) (1976 & Supp. III 1979). Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1) (1982), backpay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as

amended, 5 U.S.C. § 5596 (1976 & Supp. IV 1980), and its implementing regulations set forth in 5 C.F.R. § 550.805 (1982). The standards for computing backpay must be applied in light of the make-whole purposes of 42 U.S.C. § 2000e-16(b). Ladorn Creighton, 62 Comp. Gen. 343 (1983).

C. REMEDIES NOT ALLOWED UNDER THE BACK PAY ACT

Attorney fees and other litigation expenses (7-23)

Editor's Note: As noted in the main volume at 7-23, Title VII of the Civil Service Reform Act of 1978 amended the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii) (Supp. III 1979) effective January 11, 1980, to allow payment of reasonable attorney fees where an employee is found to have been affected by an unjustified or unwarranted personnel action. Additionally, as the text of the following cases demonstrate, 5 C.F.R. § 550.806(c) and Allen v. U.S. Postal Service, 2 MSPB 582 (1980) must be consulted to determine whether payment is "in the interest of justice."

Disability Retirement (New)

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. David G. Reyes, B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended, is allowed since GAO, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. § 550.806. Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality. Shelby W. Hollin, 62 Comp. Gen. 464 (1983).

Employee, who was reemployed by Bureau of Alcohol, Tobacco and Firearms following service with Federal Energy Agency, did not receive benefit of highest previous rate rule. Following successful claim with GAO for retroactive pay adjustment, the union representing the employee claims attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended. The claim for attorney fees is denied since payment is not deemed in the interest of justice under the circumstances. We conclude that the agency did not commit a prohibited personnel practice and that the agency neither knew nor should have known it would not prevail on the merits, two

criteria for awarding attorney fees in the interest of justice. Elias S. Frey, B-208911, June 10, 1983.

D. COMPUTATION OF BACKPAY UNDER 5 U.S.C. § 5596 (7-26)

Effect of Barring Act (New)

An intermittent Federal employee failed to receive within-grade increases due to administrative error. Upon discovery, the employing agency took corrective action under 5 U.S.C. § 5596, but submitted the back pay award claim here because the period covered spanned 19 years. Portion of claim arising before July 7, 1976, is barred since 31 U.S.C. § 71a (now 31 U.S.C. § 3702(b)(1)) limits recovery to 6-year period prior to receipt of claim here, and this Office does not have the authority to waive or modify its application. The accrual of a claim for underpayment of compensation found due pursuant to employing agency determination for services rendered is the date of performance and a new claim accrues on each day such services are rendered. 29 Comp. Gen. 517 (1950). Alfred L. Lillie, B-209955, May 31, 1983.

Alternate Employment (New)

Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was redy, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leve. Kenneth J. Clark, 62 Comp. Gen. 370 (1983).

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated on one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum

schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

Setoff of outside earnings from backpay

Unemployment compensation (7-28)

The Commissioner of Customs asks whether unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. § 5596. Under the law providing Unemployment Compensation for Federal Employees (5 U.S.C. §§ 8501, et seq.) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable State's law. Since unemployment compensation received from a State by a Federal employee during a period of wrongful separation may be required to be refunded to the State, no deduction should be made from the backpay award. Glen Gurwit, B-208097, December 7, 1983, 63 Comp. Gen. ____. See also Ralph V. McDermott, B-125137, December 7, 1983.

Editor's Note: The above cases are an accurate statement of the law in this area as of December 1983. At present, the Office of Personnel Management and the Department of Labor are considering possible ways to change the law so that unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation could be deducted from a subsequent backpay award under 5 U.S.C. § 5596.

E. OTHER MAKE-WHOLE REMEDIES

Employment discrimination (7-30)

Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. § 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not permitted under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Employee filed discrimination complaint when he was not selected for a promotion. Informal settlement of complaint without any admission of discrimination contained lump-sum monetary award to employee. Since the award is related to backpay and is less than the maximum amount recoverable if discrimination had been found, the settlement may be implemented. Only taxes and other mandatory deductions are required to be withheld from this award. Daniel L. Fisher, B-212723, September 20, 1983.

An applicant was not selected for a teaching position at West Point Elementary School and filed a discrimination complaint with the Equal Employment Opportunity Commission. The Commission ordered the Army to offer her employment with backpay and if she declined employment the pay she would have received from September of 1979 until the date the offer was made. The applicant is entitled to the full amount of her claim because, according to the applicable regulations she was available for the position during the entire period even though she accompanied her husband, a military officer, on a tour of duty in Korea for part of the period. Mrs. Lujuana Butts, B-211522, October 12, 1983, 63 Comp. Gen. ____.

GAO jurisdiction (7-30)

In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Interest on backpay awards for discrimination (7-30)

There is no authority to allow interest on backpay provided for in a Conciliation Agreement entered in the settlement of a law suit which alleged discriminatory conduct by Government officials. It is a well-settled rule of law that interest may be assessed against the Government only under express statutory authority; and neither the Equal Employment Opportunity Act, the incorporated provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., nor any other act provides express authorization of interest against the Government in this situation. Juan S. Griego, B-207176, January 6, 1983.

CHAPTER 8

OTHER PROVISIONS PERTAINING TO EMPLOYEES

E. SETTLEMENT OF ACCOUNTS OF DECEASED OFFICERS AND EMPLOYEES

Surviving spouse as designated beneficiary (8-22)

Annulment of marriage (New)

Annuity payments to the widow of a deceased member under the Retired Serviceman's Family Protection Plan which were terminated at the time of the widow's subsequent marriage in Nevada in October 1963, may be paid for the period retroactive to September 1977 when payments to the contingent beneficiaries were discontinued since a Nevada court entered a decree of annulment in December 1963, as a result of her allegations of fraud. Under Nevada law the marriage became void ab initio when the decree of annulment was entered. Alice S. Burden, B-210542, August 23, 1983.

In determining the effect of a December 27, 1963 annulment of a marriage we will follow the decision in Thurber v. United States (W.D. Wash., N.D. October 28, 1963) which held that under Nevada law an annulment of a marriage by a court of competent jurisdiction on the grounds of fraud entitled the plaintiff therein to reinstatement of an annuity under the Retired Serviceman's Family Protection Plan. Alice S. Burden, B-210542, August 23, 1983.

F. PAYMENTS TO MISSING EMPLOYEES (8-26)

Retired Pay (New)

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551-557 which permits continued payments until the member is presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death. Major James H. Ackley, USAF, Retired, 62 Comp. Gen. 211 (1983).

A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the members's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death. Major James H. Ackley, USAF, Retired, 62 Comp. Gen. 211 (1983).

H. LABOR RELATIONS MATTERS

GAO jurisdiction pursuant to 4 C.F.R. Part 22 (8-29)

Agency objects to GAO jurisdiction (8-30)

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to GAO and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter. American Federation of Government Employees, Local 2459, 62 Comp. Gen. 274 (1983).

GAO will not take jurisdiction of a union request filed under 4 C.F.R. Part 22 when the agency objects to the submission, even though the objection was not submitted within 20 days after receipt of the union request. GAO will exercise its discretion to consider comments received after the 20-day time period has expired, and in light of the agency's objection, will not assert jurisdiction in this matter because to do so would disrupt labor-management procedures authorized by 5 U.S.C. §§ 7101-7135. Customs Service Employees, B-209754, April 20, 1983.

Nondiscretionary agency policy (New)

Stated agency policy

See Howard A. Morrison, B-210917, August 10, 1983, digested above at Chapter 7, B.

Retroactive wage increases (New)

The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis. Panama Canal Employment System, 62 Comp. Gen. 605 (1983).

J. SERVICES TO EMPLOYEES (8-32)

An employee, who was required to undergo a fitness-for-duty examination and who, prior to the examination, underwent medical tests in the course of diagnosis and treatment, may not be reimbursed for the cost of these tests even though they were relied upon by the physician administering the fitness-for-duty examination. Costs of treatment are personal to the employee. Use of the tests by the physician performing the fitness-for-duty examination as part of the medical history furnished by the employee did not result in any cost to the employee beyond that already incurred for treatment. Chester A. Lanehart, B-212562, December 6, 1983, 63 Comp. Gen. ____, but see Irene Kratochvil, B-213431, February 28, 1984.

CHAPTER 9

SERVICE AS JUROR OR WITNESS

INTRODUCTION

A. STATUTORY PROVISIONS

Setoff of fees for jury or witness service in state courts (9-1)

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours. Sergeant Richard P. Stevenson, USAF, 62 Comp. Gen. 39 (1982).

SUBCHAPTER I--SERVICE AS JUROR

B. PAYMENT FOR JURY SERVICE

Jury service overlapping normal workhours (9-3)

When an employee, while serving on jury duty 8 hours a day, also performs 4 hours of his regular duties, he is not entitled to premium pay for overtime for performing his regular duties. Jury service may not be regarded as work actually performed in excess of 8 hours for which overtime compensation is payable. Internal Revenue Service Employee, B-210181, March 8, 1983.

SUBCHAPTER II--COURT LEAVE

A. ENTITLEMENT (9-7)

Overtime Compensation (New)

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

CHAPTER 10

SERVICES OBTAINED THROUGH OTHER THAN REGULAR EMPLOYMENT

SUBCHAPTER I--EXPERTS AND CONSULTANTS

E. RIGHT TO COMPENSATION (10-11)

Severance Pay (New)

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development Mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601, et seq. (Supp. III, 1979). Enrique Garcia, B-206352, October 1, 1982.

SUBCHAPTER II--CONTRACT SUPPORT AND TECHNICAL SERVICES

A. DETERMINATION TO CONTRACT OUT (10-15)

The 1979 revision of OMB Circular No. A-76 referred to in the main volume has been further revised. For the current version, see OMB Circular No. A-76 (Revised), Performance of Commercial Activities, issued August 4, 1983. See also the detailed Supplement to the foregoing revision issued by OMB in August 1983.

Editor's Note: It may also be necessary to consult Addendum No. 1 to the foregoing Supplement issued by OMB on September 14, 1983. This Addendum reproduces the section on "Tax Exempt Organizations" which was inadvertently omitted from Chapter 3, Part IV of some printed versions of the Supplement.

CHAPTER 11

PREVAILING RATE SYSTEMS

SUBCHAPTER II--BASIC COMPENSATION

F. CONVERSION AND TRANSFER BETWEEN PAY SYSTEMS AND GRADE AND PAY RETENTION (11-8)

Cost-of-living allowance (New)

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

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CHAPTER 2

ANNUAL LEAVE

D. TRANSFERS AND REEMPLOYMENT

Remployment

After military service (2-11)

An employee who retired after 20 years of military service and was employed in a Federal civilian agency in 1976 is not entitled to a recredit of the leave he alleges was available at the time he left his former civilian employment and entered military service in 1955. In the absence of official records or corroborating evidence, the employee's estimate alone is insufficient to certify a prior leave balance upon reemployment in a civilian position. John H. Adams, B-209769, March 28, 1983.

E. ADMINISTRATION OF ANNUAL LEAVE

Traveltime

Other traveltime

Administrative Discretion (2-20)--See also Francis A. Brennan, B-210686, October 19, 1983.

F. RESTORATION OF LEAVE

Under Public Law 93-181

Generally

Forfeiture because of additional holidays (2-24)--An employee on approved leave for the remainder of the 1981 leave year forfeited 4 hours of annual leave as a result of the President granting 4 hours of administrative leave on December 24, 1981. The failure of the employee's agency to counsel him of GAO's holding in Joseph A. Seymour, B-182549, August 22, 1975, that there is no authority to restore leave forfeited in this type of situation, does not constitute administrative error since the agency did not have a regulation requiring that its employees be counseled concerning

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possible forfeiture. William M. Gaultieri, B-207139, September 29, 1982.

Administrative error

What does not constitute administrative error --

Leave forfeited in connection with "buy back" (2-31)

An employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from a work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave records to show recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were found to be subject to forfeiture. Regular annual leave reinstated as the result of buy back and subject to forfeiture under 5 U.S.C. § 6304(a) (Supp. III 1979), may not be restored under 5 U.S.C. § 6304(d) nor may restored leave recredited to a prior leave year and subject to forfeiture under 5 C.F.R. § 630.306 (1982) be restored further. However, since the employing agency failed to apprise the employee of the consequences of buy back, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all forfeiture. The employee would then be entitled to be paid for the 66 hours of leave at the pay rates then in effect and he would have to refund the portion of workers' compensation covered by that leave. Edmond Godfrey, B-205709, March 16, 1983 (62 Comp. Gen. 253).

Exigencies of public business

What does not constitute an exigency of public business (2-32)--For same principle as B-197957, July 24, 1980 see Terry A. Nelson, B-209958, March 2, 1983.

Under Back Pay Act of 1966

Involuntary leave

Disability retirement (2-36)--For same principle as B-128314, January 8, 1979, but involving regular retirement rather than disability retirement, see Ralph C. Harbin, B-201633, April 15, 1983.

CHAPTER 3

LUMP-SUM LEAVE PAYMENTS

B. ENTITLEMENT (3-2)

Payable upon garnishment (New)

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case, under 5 U.S.C. 5582, the wife would also receive any money due the employee if he is deceased. However, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. 1673(b), since under Office of Personnel Management Regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

D. REEMPLOYMENT AND RECREDIT

Refund

Refund required

Not subject to waiver (3-13)--Following a 1-workday break in service, a former employee of the Panama Canal Company, who received a lump-sum payment from the Company for his accrued leave, was reemployed by the Department of the Navy. He is required by statute to refund the amount of the lump-sum leave payment he received except the amount covering his one day break in service since he was employed in Government service during the period covered by the lump-sum payment. The Government's claim may not be waived since, even if it is considered as an erroneous payment, the employee was not without fault in the matter. Darell K. Seymour, B-201211, April 11, 1983.

CHAPTER 4

SICK LEAVE

B. TRANSFERS AND REEMPLOYMENT

Reemployment after break in service

Generally

Appointment after 3 years (4-4)--An employee who had a break in Federal service of more than 3 years may not receive a recredit of sick leave on the basis that he was prevented from earlier reinstatement by the imposition of a Federal hiring freeze, and by the agency's delay in completing his required background investigation. The employee's unused sick leave may not be recredited since under 5 C.F.R. § 630.502(b)(1), recrediting of sick leave is permitted only when an employee's break in service does not exceed 3 years. Neither this Office nor the agency concerned may waive or grant exceptions to that regulation, which has the force and effect of law. Recredit of Sick Leave of FBI Employee After Break in Service, B-209068, January 20, 1983.

C. ADMINISTRATION OF SICK LEAVE

Granting

Agency discretion (4-9)

It was within the discretion of the appropriate officials of the Defense Investigative Service to decide that one of its employees who requested sick leave was entitled to it, based on evidence that the employee was absent due to a severe physically incapacitating emotional injury following the death of his wife. Michael J. DeLeo, B-207444, October 20, 1982.

Changing of separation date for purpose of granting sick leave

Generally (4-14)

The movement of a former employee's resignation date 6 months forward to the date of his death in order to permit payment of accumulated sick leave, life insurance benefits,

and a survivor's retirement annuity to his widow, may not be allowed. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error or violation of policy or regulation which would warrant a change in the employee's separation date. Although the widow states that her husband would not have intended to resign had he known of his illness, that does not establish contrary intent sufficient to change his separation date. Although the widow also suggests that the illness reduced her husband's capacity to make a responsible decision regarding his resignation, in the absence of a judicial ajudication of incapacity, we must presume that the employee had the legal mental capacity to discharge his rights and obligations. Kenneth A. Gordon, B-210645, August 12, 1983 (62 Comp. Gen. 620).

CHAPTER 5

OTHER LEAVE PROVISIONS

A. ADMINISTRATIVE LEAVE

Medical purposes

Work-related injury (5-4)

An employee who sustained a work-related injury was placed on administrative leave by the agency for a period of almost 4 months. The agency had no authority for granting the employee administrative leave for such an extended absence resulting from an injury. Accordingly, the agency should rescind the administrative leave and charge sick and annual leave for the period in question. Since the employee's leave balances were sufficient to cover only a portion of his 4-month absence from work, the agency should retroactively place him on leave without pay for the remainder of that period. Walter R. Boehmer, Jr., B-207672, September 28, 1983.

Other specific situations (5-5)

Partial shutdown of agency (New)

In its discretion, the Merit Systems Protection Board (MSPB) may retroactively grant administrative leave with pay to employees who were ordered not to report for work during a brief partial shutdown of the agency implemented in order to forestall a funding gap which would have necessitated a full closedown. The MSPB may grant such leave to the extent appropriated funds were available and adequate on the dates of the partial shutdown. Merit Systems Protection Board, B-208406, October 6, 1982 (62 Comp. Gen. 1).

Sale of a horse (New)

An employee who was transferred from Texas to Puerto Rico incident to a reduction-in-force began travel less than 30 days after travel orders were issued. The employee was granted administrative leave to sell a horse and equipment he used in official Government business which, due to the short time involved, had to be sold with professional help

at a distant location. The grant of administrative leave is a matter of agency discretion under the guidance of our decisions. We have no objection to the grant of administrative leave in the circumstances presented. Richard D. Knight, B-212688, December 16, 1983.

Union activities (5-8)

Prior to the effective date of the Civil Service Reform Act of 1978, two employees attended a meeting in their capacity as union representatives and their agency refused to grant administrative leave for the trip. At the time of their travel it was within the discretion of the agency to grant administrative leave to employees while representing employee organizations, and, in the absence of evidence that the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, we will not disturb the agency's determination. George J. Keenan and Gerald S. Goodman, B-209285, March 22, 1983.

Pending voluntary retirement (5-9)

See also Gladys W. Sutton, B-209652, August 12, 1983.

C. COURT LEAVE (5-12)

Unsuccessful plaintiff in action against Federal Government (New)

An employee who brought an action in United States District Court against the Department of Labor (DOL), seeking to prevent her removal from her position by the Secretary of Labor, was charged 4 hours of annual leave for time spent observing oral argument in her case. The District Court ruled she was improperly separated but the United States Court of Appeals upheld her separation. DOL did not abuse its discretion in charging her annual leave since there is no basis for an unsuccessful plaintiff suing the Federal Government to have such time considered official time. Furthermore, 5 U.S.C. § 6322 granting court leave to jurors or witnesses does not apply here. Ismene M. Kalaris, B-212031, September 27, 1983.

Service as witness (5-17)

Employee-defendant as witness (New)

An employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant. Entitlement of Employee-Defendant to Court Leave, B-208185, December 14, 1982 (62 Comp. Gen. 87).

D. MILITARY LEAVE

Entitlement (5-19)

Key Federal employees - members of standby reserve (New)

Special Agents of the FBI who have been designated Key Federal Employees and are members of the Standby Reserve are entitled to military leave under 5 U.S.C. § 6323(a) when they are on active duty for training. The employees may not use or be charged annual leave for such duty unless the period of active duty for training exceeds the military leave available to the employee. Federal Bureau of Investigation - Active Standby Reserve Elective Training, B-208706, August 31, 1983.

Administration of military leave

Under section 6323(a)

Nonwork days (5-22)--See also George McMillan, B-211249, September 20, 1983.

Partday (5-23)--See also George McMillan, B-211249, September 20, 1983.

Use of annual leave (5-25)--Under normal circumstances, an employee may not elect to use annual leave rather than military leave for days he is absent from his civilian employment while performing active military duty under orders at his own option. However, the employee may be involuntarily assessed annual leave, or leave without pay if appropriate, for the days he is absent from civilian employment to perform active duty for training after his military leave has been exhausted. In that situation the

employing agency should ordinarily charge the first 15 days of active duty to military leave, and then charge the days of absence from employment for the performance of additional active duty to annual leave or leave without pay. George McMillan, B-211249, September 20, 1983.

E. HOME LEAVE

Entitlement (5-27)

Generally (New)

An employee of the Department of Agriculture was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico and was thus eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. § 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred.

Since she qualified for the maximum annual leave accumulation of 45 days under 5 U.S.C. § 6304(b)(1), and completed a basic period of 24 months continuous service abroad she was entitled to accrue home leave under 5 U.S.C. § 6305(a) on the basis of her continuous service. Although the rate at which she earned home leave was subject to the agency's interpretation of implementing regulations at 5 C.F.R. § 630.604, the agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted.

The agency's policy which purports to deny the 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in the continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements. Estelle C. Maldonado, B-208908, July 13, 1983 (62 Comp. Gen. ___).

Administrative discretion (5-28)

The determination as to when and in what amount home leave will be granted is a matter for administrative determination. Estelle C. Maldonado, B-208908, July 13, 1983 (62 Comp. Gen. ___).

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CHAPTER 2

APPLICABILITY AND GENERAL RULES

SUBCHAPTER I-APPLICABILITY

B. Specific classes of persons covered (2-1)

Employees engaged in collective bargaining (New)

The United States Supreme Court has found that employees representing their union in collective bargaining with their agency are not entitled to the payment of travel expenses and per diem allowances under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Bureau of Alcohol, Tobacco and Firearms, Petitioner v. Federal Labor Relations Authority et al., 44 CCH S. Ct. Bull. B281 (No. 82-799 Nov. 29, 1983). See also, George J. Keenan and Gerald S. Goodman, B-209285, March 22, 1983.

Appointee's travel to first duty station

Manpower shortage positions

Authorization of travel expenses --

Authorization after travel is completed (2-14)

A temporary employee was offered and accepted a permanent position with the U.S. Forest Service in Alaska while serving in California. The appointment was deferred due to a hiring freeze. He was then offered a temporary position in Alaska pending the lifting of the freeze. He resigned his position, had a break in service of 11 days, and traveled at his own expense to accept the temporary appointment. After the hiring freeze was lifted, the employee was again offered a permanent appointment. He accepted, and his temporary appointment was converted to a permanent one. Because of the break in service, he could be reimbursed travel and transportation expenses as a new appointee in traveling to accept a temporary position at a post of duty outside the continental U.S. under 5 U.S.C. § 5722, even though a travel authorization had not been issued. Robert E. Demmert, B-207030, September 21, 1983.

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Reemployment after separation (2-15)

An employee who was separated by a RIF was not entitled to travel expenses incurred when she traveled at a later date back to that location to accept a temporary appointment. There was no statutory authority for payment, since 5 U.S.C. § 5724a(c) requires that the employee must be reemployed in a nontemporary position, and in a different geographical location, in order to be reimbursed. Jan Evans, B-209026, February 9, 1983.

Intergovernmental Personnel Act

Federal Government employees

Per diem versus station allowances -- (2-16) Agencies should recognize that ordinarily for assignments of 2 years, per diem would be inappropriate. William T. Burke, 207447, June 30, 1983.

SUBCHAPTER II - GENERAL RULES AND DEFINITIONS

D. Official duty station

Determination question of fact (2-30)

An employee of the U.S. Forest Service grieved his entitlement to per diem in connection with his assignment to a seasonal worksite every 6 months. We agreed with the Grievance Examiner's factual determination that the employee was in a TDY status and therefore was entitled to per diem as provided for in the U.S. Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employee maintained his permanent home at his official duty station while living in Government quarters at the seasonal worksite. Frederick C. Welch, B-206105, December 8, 1982.

The assignment of a U.S. Customs Service employee to a new duty station for 2 years under a rotational staffing program was held to be a PCS rather than TDY. We have held that the duration of an assignment and the nature of the assigned duties are the vital elements in the determination of whether an assignment is TDY or a PCS. Although the assignment here was for a definite time period and further reassignment of the employee was contemplated, the duration of the assignment was far in excess of that normally contemplated as temporary. Moreover, the duties assigned were not those usually associated with TDY. Peter J. Dispenzirie, 62 Comp. Gen. 560 (1983).

CHAPTER 3

PURPOSE FOR WHICH TRAVEL MAY BE AUTHORIZED

H. Temporary duty

Unscheduled return to official station on workdays

Illness in family (3-8)

No substantial completion of assignment (New)

The return travel expenses of an employee who abandoned a TDY assignment for personal reasons--his wife's illness--could not be paid, since it was administratively determined that he did not substantially complete the assignment. The assignment was to evaluate a 2-week training course, and the employee returned home at the end of the first week. Since the administrative determination was not shown to be improper or unjustifiable, we would not disturb it. Eugene S. Sheskin, B-211692, June 9, 1983.

Effect of early arrival on entitlement (New) (3-9)

An employee claimed reimbursement for lodging expenses incurred on the evening prior to the day he began TDY. He is entitled to reimbursement, even though he did not perform official duty on that day. He had been issued a General Travel Authorization permitting him to travel without specific prior authorization. He took annual leave on Friday for personal travel and traveled to his TDY site on Sunday, rather than returning to his official duty station and proceeding to his TDY site on Monday. Since he began work Monday morning, the lodgings expenses on Sunday were incident to official duty under the circumstances of the travel. Walter Wait, B-208727, January 20, 1983.

L. Fitness for duty examination (New) (3-21)

An employee who is required to undergo a fitness-for-duty examination as a condition of continued employment may choose to be examined either by a U.S. medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed. Travel Expenses Arising from Employee's Fitness for Duty Examination, B-208855, April 5, 1983.

CHAPTER 4

TRANSPORTATION

SUBCHAPTER I-TRANSPORTATION ALLOWABLE

A. Authorized modes of travel

Use of U.S. air carriers--the Fly America Act

Scheduling and routing travel

Indirect travel--(4-6) En route home from TDY overseas, an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the U.S. on a U.S. air carrier. Upon arrival in Shannon, the employee was informed that his scheduled flight had been discontinued, and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers for the transoceanic portion of his travel, no penalty was necessary for the use of a foreign air carrier. Fly America Act Penalty for Involuntary Re-routing, 62 Comp. Gen. 496 (1983).

Considerations not justifying use of foreign air carrier service

Misunderstanding of the law--(4-8) Employees whose international travel was routed by a transportation official of the agency on non-certificated carriers in violation of the Fly America Act were liable for the expenses incurred by such travel, even though agency regulations required transportation officers to make travel arrangements. Transportation expenses incurred in violation of the Fly America Act may not be paid from appropriated funds, and transportation officers acting in their official capacity are not subject to the imposition of liability for errors of judgment. General William Coleman USAF, et al., B-206723, October 21, 1982.

Considerations justifying use of foreign air carrier service

Generally--(4-10) Under guidelines issued by the Comptroller General, reasons for the use of foreign air carrier must be properly certified. Comptroller General decisions contain guidelines regarding the adequacy of

reasons for utilizing a foreign carrier. The Joint Travel Regulations require a determination of unavailibility by the transportation or other appropriate officer, and the requirements contained therein are in keeping with the Comptroller General's guidelines, and reimbursement is not authorized absent compliance with them. John King, Jr., 62 Comp. Gen. 278 (1983).

Diplomatic Considerations (New) (4-10)

An employee assessed a Fly America Act penalty for foreign air carrier travel to and from China as a member of a delegation offered the explanation that foreign air carrier travel enabled the delegation to arrive as a group, and that individual arrivals would have interfered with diplomatic process. If his agency determined that diplomatic considerations would warrant finding that the use of a U.S. air carrier would not accomplish the agency's mission, his liability could be excused on the basis that travel by a foreign air carrier was a matter of official necessity. Daniel Bienstock, B-205206, April 15, 1983.

Military Airlift Command service available (New) (4-10)

An employee of the Navy en route from TDY overseas selected a particular schedule for the purpose of taking leave along a usually traveled route. He used a foreign air carrier for one leg of his travel, even though he could have used MAC chartered air service for travel from his place of origin to the U.S. Since MAC full plane charter services need not be considered as available U.S. air carrier service under the Fly America Act, his use of a foreign air carrier could be justified in the usual manner using only available commercial flights. However, under his travel order and the applicable regulation, reimbursement for his return travel was limited to the constructive MAC cost. Nelson P. Fordham, 62 Comp. Gen. 512 (1983).

B. Other expenses incident to transportation

Insurance premiums

Liability for damages (4-19)

A Navy employee on TDY who was authorized commercial car rental declined the extra collision insurance necessary to provide full coverage, and became obligated to pay any loss through collison damage to a maximum of $500. While on a

trip outside the primary duty area, and going to a restaurant with a friend and his wife, he allowed the friend to drive the rental car, and the vehicle was damaged in an accident. The Navy determined that the automobile was being used on other than official business. That determination was not questioned, and reimbursement for the personal funds that the employee paid for the damages was not authorized. Timothy J. Doyle, B-209951, June 7, 1983.

Liability insurance (4-19)

A contracting officer of the Equal Employment Opportunity Commission authorized the rental of an automobile, including the payment of the collision damage waiver and personal accident insurance. The rental agency could not be paid for that part of the invoice pertaining to these insurance items, since FTR para. 1-3.2c(1) prohibits payment for collison damage insurance, and the same rule applies to personal accident insurance. Avis Rent a Car-Insurance-Collision Damage Waiver, B-208630, March 22, 1983.

SUBCHAPTER III--RULES ASSOCIATED WITH USE OF COMMERCIAL TRANSPORTATION

B. Taxicabs

Between lodging and food facility (4-31)

An employee on TDY in Houston, Texas, claimed cab fares to obtain meals while in Miami, Florida, during a holiday weekend. Cab fares may not be paid under FTR para. 1-2.3b where, for reasons of personal preference and not due to the nature of the TDY assignment, the employee obtains meals in distant locations. Jeffrey Israel, B-209763, March 21, 1983.

C. Rental automobiles and special conveyances

Generally (4-31)

An official at DOE, who headed the U.S. delegation to an international conference, could be reimbursed for a tip to the driver of a car hired with driver by the American Embassy in Vienna, Austria, for his use during the conference. DOE has determined that the tip was appropriate and customary in these circumstances, and applicable regulations authorize reimbursement of local transportation expenses, including tips for official business when an employee is on a TDY assignment. W. Kenneth Davis, B-211227, September 28, 1983.

Authorized or approved (4-31)

An employee claimed reimbursement for costs incurred incident to his use of a rental car while attending a conference. The agency, contending that use of a rental car was not authorized as advantageous to the Government, determined that the employee should have used an alternative, less expensive mode of transportation. Accordingly, the employee's reimbursement for this item was reduced by the agency, the amount being calculated by comparison to expenses incurred by other agency travelers attending the same conference. Although the duly authorized official approved the employee's voucher, he did so without making a determination of advantage to the Government, and given the factors involved, no such determination could have been made. The method used by the agency to reduce the claimed reimbursement for this item was not arbitrary or capricious, and so was permissable. Robert P. Trent, B-211688, October 13, 1983. See FTR paras. 1-2.2b and 1-2.2c(1)(a).

SUBCHAPTER IV--REIMBURSEMENT FOR USE OF PRIVATELY-OWNED CONVEYANCES

A. Mileage payments

Generally (4-40)

The travel orders of a Navy civilian employee limited reimbursement for first duty station travel by POV to the constructive cost of commercial air travel. Both FTR para. 2-2.3a and 2 JTR para. C2151(3), however, state that use of a POV for such travel is advantageous to the Government. Where the applicable regulations prescribe payment, the claim must be allowed--regardless of the wording of the travel orders. Dominic D. D'Abate, B-210523, October 4, 1983, 63 Comp. Gen. _____ (1983).

Discretionary authority or approval

Travel in the vicinity of TDY station (4-45)

A DOE employee claimed mileage at his TDY station in order to obtain meals. The FTR allows reimbursement of such travel only when the TDY assignment is such that suitable meals cannot be obtained. Based on information before us, we concurred with the agency determination to deny such expenses. Gene Daly, B-197386, June 15, 1983.

Distance measurements

Automobile and motorcycle

Deviations requiring explanation--(4-45)

Where an employee transferred from San Francisco to Minneapolis avoided automobile travel via the most usually traveled route on the advice of the American Automobile Association, he could be paid a mileage allowance for travel of an additional 513 miles distance by a more southerly, but still usually traveled route. He could not be paid additional mileage for a deviation from that usually traveled route. Timothy F. McCormack, B-208988, March 28, 1983.

D. Privately-owned conveyance in lieu of common carrier

Computation of constructive cost (4-52)

Two terminals serve same area (New)

Although his travel orders reflected a higher estimated cost based on common carrier transportation using a terminal at Melbourne, Florida, an employee who traveled by a POV to and from Patrick Air Force Base, Florida, as a matter of personal preference, was entitled to mileage reimbursement limited to a lower cost airfare based on travel by way of the airport at Orlando, Florida. Where two terminals serve the same origin or destination, the constructive cost reimbursement should be based on a routing by way of the terminal giving the Government the benefit of any lower transportation costs. Leland G. Jackson, B-207496, November 9, 1982.

Common carrier available (4-52)

Because of a medical condition affecting an employee's eardrums, he was unable to travel by air to a TDY station. Instead of traveling by train, he chose to travel by POV, with reimbursement limited to the constructive cost of travel by common carrier. Since travel by air was not available to the employee, the "appropriate" common carrier transportation under FTR para. 1-4.3 was rail transportation, and the constructive cost of rail, rather than air, transportation was thus applicable. Timothy W. Joseph, 62 Comp. Gen. 393 (1983).

E. Privately-owned conveyance in lieu of Government vehicle

Generally

Not committed to use a Government-owned automobile (4-56)

An employee, who was a member of an agency review team and authorized to perform TDY travel in a group by Government-owned van, received permission to travel by POV as an exercise of personal preference. Since the agency did approve his POV use, and since the regulations do not authorize proration of reimbursement where a Government vehicle is used anyway, the employee could be reimbursed mileage at the rate authorized by FTR para. 1-4.4c. Don L. Sapp, 62 Comp. Gen. 321 (1983).

CHAPTER 5

OTHER EXPENSES ALLOWABLE

A. Baggage

Handling charges

Government-owned property (5-1)

An employee claimed reimbursement for tips paid to airport porters for the handling of a box containing literature acquired at a conference. The agency reduced the amount allowed for reimbursement, contending that the amount claimed by the employee was unreasonable. We will not disturb an agency determination regarding reasonableness of an expense, absent a showing that the determination was arbitrary, capricious or clearly erroneous. Moreover, since no separate charge was made for the handling of the box, the amount allowed for reimbursement should be charged to the employee's actual subsistence allowance, rather than as a necessary business expense. Robert P. Trent, B-211688, October 13, 1983.

B. Communication services

Official purpose and personal business (5-2)

Telephone calls before and after days of conference (New)

An employee claimed reimbursement for the cost of local telephone calls charged to his hotel room. The agency had disallowed reimbursement for local calls dated for the day before and day after the dates on which the conference which he attended was in session, stating that there was no need for the employee to conduct official business on these days. The employee bears the burden of proving that the costs incurred were essential to the transacting of official business. Because the employee failed to prove that these telephone calls were necessary business expenses incident to his official travel, his claim was denied. Robert P. Trent, B-211688, October 13, 1983.

C. Miscellaneous travel expenses

Other expenses (5-10)

Pet care (New)

An employee of HUD sought reimbursement for the cost of boarding his pet in a kennel while he was on TDY. Kennel expenses could not be paid, since neither 5 U.S.C. § 5706, nor FTR Chapter 1, Part 9, authorize such an entitlement. Absent statutory or regulatory authorization, kennel costs may not be reimbursed. John A. Maxim, Jr., B-212032, July 6, 1983.

Locksmith fee (New)

An employee on official travel may not be reimbursed for a locksmith fee incurred because he locked himself out of his rental car. The FTR does not allow reimbursement, because the fee was not necessarily incurred in the transacting of official business. The fee is personal to the employee, and so is not payable by the Government. Robert Berman, B-210928, April 22, 1983.

CHAPTER 6

PER DIEM

A. General provisions

Payment of per diem discretionary (6-1)

Pursuant to 2 JTR para. C8101-3f, (currently 2 JTR para. C4552-3f), a Navy activity had authority and responsibility for issuing a directive establishing a special rate of per diem for TDY to Andros Island, Bahamas, based on a determination that commercial establishments which prepare and serve meals were unavailable. The determination of the availability of commercial establishments was a matter within the discretion of the appropriate officials of the Navy activity. Absent clear evidence that the Navy officials abused their discretion, GAO will not question the conclusion that commercial establishments were unavailable. Per Diem Allowances--Temporary Duty at Andros Island, Bahamas--Reconsideration, B-201588, March 8, 1983.

Per diem at headquarters

Extraordinary circumstances (6-3)

An employee who was selected to fill a vacant position with his duty station in Missoula, Montana, and with TDY to be performed in Kalispell, Montana, could be paid per diem for duty he performed at Kalispell from July 27, 1981, through August 3, 1982, pending a relocation of the District Office to Missoula, since the evidence indicates Kalispell was a TDY station. It was intended that the employee perform TDY at Kalispell for only a short period of time, but there were difficulties in locating suitable office space. Further, the employee had reason to expect that the assignment would terminate at an early date. Don L. Hawkins, B-210121, July 6, 1983.

C. Expenses not covered by per diem (6-13)

Leased personal property with option to buy (New)

Absent evidence that a claimant terminated a television lease agreement with an option to purchase at the end of a TDY assignment, he could not include the cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable. Lucius Grant, 62 Comp. Gen. 635 (1983).

D. Interruptions of per diem entitlement

Voluntary return travel

Generally (6-21)

A DOE employee claimed weekend return travel reimbursement based on the maximum per diem rate, rather than the lesser amounts allowed for the use of a travel trailer during the week at the TDY station. The agency's determination to look to the average amounts allowed in the week preceding the return travel was permissable. Gene Daly, B-197386, June 15, 1983.

An employee on an IPA assignment to a university in Fayetteville, Arkansas, claimed travel expenses for his return to Kansas City on nonworkdays. Although it was originally intended that he would relocate his residence and change his PDY station to Fayetteville, his travel orders were ambiguous as to whether TDY entitlements or PCS allowances, or both, were authorized. Since employees traveling on IPA assignments may receive per diem or PCS allowances, but not both, we did not object to the employee's election to be paid per diem at Fayetteville; and the travel expenses claimed, insofar as they do not exceed the per diem that would have been paid, if he had stayed in Fayetteville for the nonworkdays involved. Dr. William P. Hefly, B-208996, April 12, 1983.

E. Computation of per diem

Beginning and ending entitlement

"Thirty-minute rule" (6-27)

The 30-minute rule applicable to the payment of per diem under FTR para. 1-7.6e is not intended to be applicable to continuous travel of 24 hours or less. Lloyd G. Chynoweth, 62 Comp. Gen. 269 (1983).

F. Rates (6-31)

Lodging at employee's property held for rental (New)

An employee on an extended temporary assignment lodged in a camp which he owned and claimed to hold as rental property. For the entire period of his temporary assignment, he claimed per diem for lodging in an amount which he says is the minimum for which

he would have rented his camp to sportsmen on a daily basis. Payment of his claim could not be authorized in the absence of clear and convincing evidence that the lodging would have been rented during the entire period covered by his claim, and then only for the expenses occasioned by his temporary assignment. Rodney J. Gardner, B-210755, May 16, 1983.

An employee who used his mobile home for lodging while on TDY could not include a $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance, even though he claimed that the mobile home was held for rental purposes. If the employee submitted documentation to establish that the property was held and used as a rental unit and would otherwise have been rented out during the period of his claim, allocable interest and taxes incurred, if any, could be included in determining his lodging costs. Lucius Grant, Jr., 62 Comp. Gen. 635 (1983).

Rates fixed by agencies

Lodging-plus method

Lodging with monthly rate--(6-32) An employee rented a house for a month while on TDY, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period, but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis could be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determined the employee acted prudently in obtaining the lodgings for a month and the cost to the Government did not exceed the cost of suitable lodging at a daily rate. Jesus Soto, Jr., 62 Comp. Gen. 63 (1982).

Reduced per diem (6-33)

Travel trailers--(New) A DOE employee who used a travel trailer for TDY failed to justify his additional expenses after DOE amended its per diem for the use of travel trailers to $23 for meals and miscellaneous expenses and $15 for "incidental expenses" such as space rental, utilities, etc. We did not find the DOE policy unreasonable and we could not agree with the employee that he was entitled to a flat per diem. Gene Daly, B-197386, June 15, 1983.

CHAPTER 7

ACTUAL SUBSISTENCE EXPENSES

B. At duty station (7-1)

An employee who had been in an actual subsistence expense travel status requested reimbursement for drycleaning expenses incurred before the departure and after his return from his official travel. The FTR permits reimbursement of an employee's expenses on an actual subsistence expense basis only for expenses which are incurred during official travel. Since these expenses were incurred before and after the employee was in a travel status, they were not reimbursable. James E. Dorman, B-207039, March 1, 1983.

C. Types of expenses covered (7-1)

Meal provided as integral part of training (New)

Where an employee was authorized travel to attend a training conference in an HRGA and lunches were provided as an integral part of the training, her reimbursement for her actual subsistence expenses otherwise limited to $75 a day had to be reduced by the value of the lunches to the employee. Judy A. Whelan, B-207517, April 13, 1983.

Additional meals (7-1)

An employee on TDY obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on the evening of this return from TDY, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as elapsed time between meals and absence of in-flight meal service may be considered. Shawn H. Steinke, 62 Comp. Gen. 168 (1983).

Excessive meal costs (7-3)

Certain employees were authorized actual subsistence expenses for the first 30 days of their TDY assignment. The employees obtained lodging at a monthly rate and at significant savings over the average daily rate charged for other available lodging. The lodgings savings resulted in proportionally higher meal expenses than the agency anticipated, causing the agency to question the reasonableness of the employees' meal expenditures. Employees

are entitled to reimbursement only for reasonable expenses for meals, since a traveler is required to act prudently in incurring such expenses. Here, the agency had established guidelines limiting the amount that employees properly could spend on meals, and the employees' expenditures were within those guidelines. Since there was no further evidence that the meal expenses claimed were extravagant or unreasonable under the circumstances, the employees could be reimbursed for their expenditures. Social Security Administration employees--Claims for actual subsistence expenses while on temporary duty, B-208794, July 20, 1983.

Apartment costs (7-3)

An employee on TDY who lodged at the apartment of a private party was not entitled to reimbursement of the amount paid for his lodgings in the absence of evidence that the rental agreement was the result of an arm's-length business transaction between the parties, or that the expenses were otherwise reasonable and within the standards set forth in 52 Comp. Gen. 78 (1972). Andres Tobar, B-209109, December 15, 1982.

An employee, who was on a TDY assignment scheduled to last for approximately 6 months, received instructions that any apartment rented should only be on a month-to-month basis. However, he signed a 1-year lease, and when his assignment was terminated prior to the expiration of the lease term and he vacated the apartment prematurely, he forfeited a security deposit. The employee could not be reimbursed the security deposit, since the employee acted unreasonably in signing a 1-year lease in these circumstances. Jeffrey Israel, B-209763, March 21, 1983.

D. Travel to an HRGA (7-3)

An employee who was returning from TDY remained overnight in an HRGA when his connecting flight home was cancelled. Although the FTR normally precludes reimbursement for actual subsistence expenses where the HRGA is only an en route or stopover point and no official business is performed, this employee could be reimbursed for his actual expenses due to the unusual circumstances of the travel. See, FTR para. 1-8.1c. John F. Clarke, B-209764, March 22, 1983.

Meals on TDY in city of residence which is not the employee's PDY station (New)

An itinerant employee who did not regularly report to a PDY station and who maintained his residence outside commuting

distance from his duty station claimed reimbursement for his lunch and other meals on days that he commuted between his permanent residence and his TDY worksite in the same city. Since this location was an HRGA, subsistence should be paid on an actual expense basis. The agency disallowed the claims under a provision of local regulations which it interpreted as limiting the claimant to the reimbursement of costs which would not be incurred by an employee living and working at a PDY station. Though the employee pointed to provisions in the agency regulation in support of his claim, those provisions were not so clear as to require reversal of the agency determination to disallow reimbursement. John C. Sihrer, B-211244, September 27, 1983.

G. Authorized reimbursement (7-9)

Agency-established maximum (New)

An employee claimed reimbursement for meal and miscellaneous expenses incurred while attending a conference. The agency reduced the amount allowed for reimbursement on this item to a percentage of the statutory maximum actual subsistence allowance, as specified in an agency guideline. We concluded that the agency was justified in reducing the employee's reimbursement for meal and miscellaneous expenses, and that the formula used to reduce these expenses, was not arbitrary nor capricious, and so was permissible. Robert P. Trent, B-211688, October 13, 1983.

Exceeds statutory maximum (7-9)

There is no authority to waive or modify the statutory maximum for daily actual subsistence expenses. See, Milton S. Mintz, B-208473, October 20, 1982.

The Director of the USIA requested a determination that the USIA could rent accomodations for employees on TDY at a cost in excess of the statutory limitation where the use of the particular accomodations is an integral part of the employee's job and failure to provide such accomodations would frustrate the ability of the USIA to carry out its statutory mandate. Under the circumstances described by the Director, including implementing administrative safeguards, we held that the USIA could rent the accomodations as required. The costs are a necessary administrative expense of transacting official business. United States Information Agency--Excess Cost of Hotel Rooms, B-209375, December 7, 1982.

H. Agency responsibilities

Constructive travel (7-10)

An employee, prior to leaving his PDY station for his leave point, was authorized travel to two TDY stations and return. Since the authorization for TDY occurred before the departure from the PDY station, he was properly reimbursed his actual travel expenses not exceeding the constructive cost of round-trip travel by a direct usually traveled route between the PDY and TDY stations. Lawrence O. Hatch, B-211701, November 29, 1983.

I. Interruption of subsistence status

Subsistence status interrupted for personal reasons (7-11)

An employee, whose official duty station was Washington, D.C., was on TDY assignment in New York City. He took annual leave on Thursday and Friday and utilized the weekend to attend a family funeral in Denver. He returned to his TDY site on Sunday. Although the employee would be entitled to subsistence expenses for Saturday and Sunday, he is not entitled to the constructive cost of 2 days subsistence as an offset against the cost of his travel to and from Denver. William H. Tueting, B-208232, December 2, 1982.

Weekend return travel (7-11)

An employee, whose official station was Martinsburg, West Virginia, and who was performing TDY in Cincinnati, Ohio, traveled to Parkersburg, West Virginia, on the weekends for personal reasons. The employee could not be reimbursed transportation expenses on a comparative cost basis under FTR para. 1-8.4f, unless he returned to his PDY station or place of abode. During weekend travel to a location other than his residence or PDY station, his entitlement to actual subsistence expenses continued, and the fact that he actually incurred relatively few subsistence expenses did not entitle the employee to reimbursement of transportation costs incurred for personal reasons. James R. Curry, B-208791, January 24, 1983.

CHAPTER 8

TRAVEL OVERSEAS

D. Educational travel

Entitlement (8-2)

Since the entitlement to educational travel expenses under 5 U.S.C. § 5924(4)(B) is limited to travel to and from a univeristy in the U.S., an employee was not entitled to the expenses for a dependent's travel between his overseas duty station and the Munich, Germany, campus of the University of Maryland. Educational Travel Expenses, B-209292, February 1, 1983.

Indebtedness for educational travel expenses erroneously paid under 5 U.S.C. § 5924(4)(B) may not be waived, since travel and transportation expenses and allowances are specifically excluded from the waiver authority of 5 U.S.C. § 5584. The fact that section 5924 is entitled "Cost-of-living allowances," does not change the character of the travel expense payments authorized by that section. Educational Travel Expenses, B-209292, February 1, 1983.

E. Miscellaneous (8-2)

Separation travel (New)

In order for an employee to be reimbursed expenses incident to his return travel to his former place of residence, the travel must be clearly incidental to his separation and should commence within a reasonable time thereafter. An employee who resigned his position in Alaska effective October 2, 1981, notified his agency on March 2, 1982, of his intent to return to his former place of residence in the continental U.S. commencing on September 23, 1983, and who accepted employment at the location of the resigned position, did not meet the requirements for reimbursement. Consuelo K. Wassink, 62 Comp. Gen. 200 (1983).

CHAPTER 9

SOURCES OF FUNDS

B. Advance of funds (9-1)

Excessive advance (New)

Travel advances are in the nature of a loan given to an employee and should only be given when clearly necessary. Also, travel advances should be held to the minimum amount necessary, which generally will be an amount to cover a time period before a voucher can be prepared by the traveler and processed by the agency. A $28,500 advance given an employee to cover his estimated per diem for a 1-1/2-year period was clearly beyond the contemplation of the statute and regulations authorizing travel advances. William T. Burke, B-207447, June 30, 1983.

C. Contributions from private sources--18 U.S.C. § 209

Application of 18 U.S.C. § 209 to travel

Exceptions (9-3)

In Customs Service Charging User Fees To Recover Cost of Instructing Travel Agents, 62 Comp. Gen. 262 (1983), we concluded that when employees of the U.S. Customs Service participate as instructors in programs to train travel agents in U.S. Customs Service requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the U.S. Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the U.S. Customs Service pursuant to 19 U.S.C. § 1524.

The U.S. Customs Service did not possess any general statutory authority to accept and use gifts or donations for agency purposes. Thus, if the offered items were considered as donations, acceptance and use of them by the U.S. Customs Service would be precluded as an unauthorized augmentation of their appropriations. See, 16 Comp. Gen. 911 (1937). Furthermore, the airlines, schools and travel agents participating in the seminars and providing the offer of the free ticket did not appear to be eleemosynary institutions such that acceptance by the employee of the cost of transportation and accomodation would be authorized by 5 U.S.C. § 4111. Consequently, the U.S. Customs Service

proposed that acceptance be considered proper under 31 U.S.C. § 9701 authorizing agencies to charge user fees to recipients of special benefits or services.

Here, the U.S. Customs Service informally advised us that providing information to the public about procedures and requirements affecting travelers is within the scope of its authorized agency activities. The U.S. Customs Service further stated that the normal procedure for responding to inquiries is not through seminars, but by the use of pamphlets or response to questions from travelers at the U.S Customs Service clearance stations. However, here the U.S. Customs Service intended to participate at the request of the program sponsors, and it was the sponsors and the travel agents who would have primarily benefited from this activity by having the U.S Customs Service representatives present to provide responses to any inquiries that might arise following their discussions of U.S. Customs Service clearance procedures and requirements for travelers.

We had no objection to the U.S. Customs Service charging a fee for this service, even though some incidental public benefit was also served by their conduct of this activity. However, the fee recovered had to be reflective of the full cost of providing the special benefit in question, i.e., the full travel costs of the employees who provide the special benefit. We noted in this regard, that no recovery was proposed to be made for all the costs incurred while the employee was in a travel status. For example, subsistence or per diem costs (with the possible exception of accomodations) did not appear to have been included in the proposal made by the U.S. Customs Service.

CHAPTER 10

CLAIMS FOR REIMBURSEMENT

C. Records of travel and expenses

Evidence sufficiency (10-4)

The burden is on the claimant to establish the liability of the U.S. and the claimant's right to payment. Thus, a HUD employee, appealing HUD's denial of reimbursement for certain travel expenses claimed to have been incurred while on TDY could not be reimbursed for those expenses for lodging which he could not convincingly demonstrate were both actually incurred in the amount claimed and essential, both as to amount and purpose, to transacting official business. Raymond Eluhow, B-198438, March 2, 1983.

Actual subsistence

Receipt required--(10-5) Where the Foreign Service Travel Regulations require receipts for each allowable cash expenditure in excess of $15, unless it is not practicable to obtain them or unless the duties of the traveler were of a confidential nature, AID properly disallowed actual subsistence expense claims for individual meal costs in excess of $15 each in the absence of receipts therefore. William L. Stanford and Mervin L. Boyer, Jr., B-207453, December 22, 1982.

Evidence of authorization (10-8)

A DOE employee sought reimbursement for two trips on TDY which his agency denied on the basis that the travel was unauthorized. Where the first trip was supported by the employee's blanket travel authorization and statements from other employees justifying the need for the trip, that travel could be reimbursed. Absent such evidence supporting the second trip, that claim was denied. Gene Daly, B-197386, June 15, 1983.

D. Preparation of voucher (10-8)

An employee requested reimbursement for costs claimed to have been incurred for taxicab service in traveling to, and returning from, the airport. The employee refused to provide his residence address, contending that the agency had no authority to request such information. The FTR required that the employee provide his residence address with his travel voucher. Since the employee

refused to provide this information, we concluded that the agency could properly deny reimbursement for the item. Robert P. Trent, B-211688, October 13, 1983.

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OFFICE OF GENERAL COUNSEL
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CHAPTER 1

INTRODUCTION

A. RELOCATION EXPENSES UNDER 5 U.S.C. §§ 5721-5733

Statutory authority (1-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. §5723(a)(1), effective the date of enactment, to include a Presidential appointee whose appointment requires Senate confirmation and whose rate of pay equals or exceeds the minimum pay of grade GS-16.

Employees covered

Employees of the National Credit Union Administration (1-5)

The National Credit Union Administration (NCUA) is an independent agency within the executive branch of the Government. Hence, NCUA is an "Executive agency" within the meaning of 5 U.S.C. § 5721(1) (1976), and the entitlement of its employees to relocation expenses is governed by 5 U.S.C. Chapter 57, subchapter II. Edgar T. Callahan, B-210657, November 15, 1983 (63 Comp. Gen. ____).

Employees not covered

Employees paid under Title 37, U.S.C. (1-6)

A Commissioned Officer in the Public Health Service (PHS) who was separated from the officer corps and recruited to fill a Veterans Administration manpower shortage position in California, seeks reimbursement of real estate expenses for sale of his old residence in Maryland on separation and purchase of a new residence in California. As a member of a uniformed service, his pay and allowances were prescribed by Title 37, U.S. Code, which does not provide for such reimbursement. Reimbursement provisions of 5 U.S.C. §§ 5721-5733 are applicable only to civilian employees. Since the purported transfer was a separation from a uniformed service followed by a subsequent new appointment, there is no authority to reimburse real estate expenses for new appointees. Albert B. Deisseroth, 62 Comp. Gen. 462 (1983).

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CHAPTER 2

GENERAL CONDITIONS AND REQUIREMENTS

A. GENERAL REQUIREMENTS

Service Agreements

Resignation following agreement execution (2-3) (New)

Employee accepted a transfer and signed the required 12-month service agreement. He resigned after 5 months and became obligated to reimburse the Government for his relocation expenses. The fact that the employee had previously transferred in a position which gave him "transfer of function rights" back to first station did not in itself entitle him to perform the return travel at the Government's expense. An employee is required to sign and fulfill the terms of a new service agreement in connection with each permanent change of station within the continental United States. See paragraph 2-1.5a(1)(a) of the FTR. Kenneth J. Bray, B-211449, July 11, 1983.

B. TRANSFERS

What constitutes a transfer

Agency defined (2-12) (New)

The claimant transferred from a position in the Office of the Architect of the Capitol to one in the Department of Energy as a manpower shortage category appointee. There was no transfer between agencies for the purposes of 5 U.S.C. § 5724a because the Office of the Architect of the Capitol is not included within the definition of "agency" under 5 U.S.C. § 5721. Therefore, the claimant is limited to recovering the expenses allowed under 5 U.S.C. § 5723 for manpower shortage positions, and he is not entitled to the additional relocation expenses allowable under 5 U.S.C. § 5424a. Charles L. Steinkamp, B-208155, July 12, 1983.

Transfer effective date (2-12) (New)

Because regulations and amended regulations both unambiguously define "effective date of transfer," as the date an employee

reports for duty at his new official station, employee who reported for duty prior to effective date of amended regulations may not be paid increased miscellaneous expense allowance. Effective date indicated on Form SF-50 is not determinative of effective date of transfer. Robert A. Motes, B-210953, April 22, 1983.

Moves between quarters locally (2-17)

Employee, who was transferred to new official duty station 36 miles away from old station, is not entitled to relocation expenses where the agency determines that relocation of the employee's residence was not incident to the transfer of duty station. We will not upset agency's determination that employee's relocation was not incident to transfer where, although employee attempted to sell home and moved family and household goods out of residence, the record contains no evidence of employee's intention or good faith attempt to relocate closer to new duty station. Jack R. Valentine, B-207175, December 2, 1982.

Notice of Transfer

Project assignment ended (2-21) (New)

Employee who was transferred claims reimbursement for the costs of selling his residence. Since project to which employee was assigned was ended, and since agency was not able to give definite reply to inquiry concerning his next assignment, employee reasonably believed that he would be transferred and placed his house on the market. Employees may be reimbursed for expenses of sale as totality of circumstances indicates substantial compliance with requirement that there be an administrative intention to transfer an employee when real estate expenses are incurred. Lawrence C. Jackson, B-207564, November 22, 1982.

Transfers for convenience of the employee

Agency determinations (2-25) (New)

A transferred employee's entitlement to relocation expenses depends upon a determination that the transfer is not primarily for convenience or benefit of employee and the Comptroller General will not disturb an agency determination unless it is clearly erroneous, arbitrary, or capricious.

Thus, an agency determination to deny relocation expenses to a transferred employee is sustained where the agency's determination that transfer was for the employee's own convenience was based on the fact that the employee voluntarily trasferred to accept position with lower grade with no greater potential for promotion. The fact that he was competitively selected for the position is not a basis to overturn agency determination. Curtis E. Jackson, B-210192, May 31, 1983.

G. FRAUDULENT CLAIMS (2-46) (New)

See, generally, discussion of cases in CPLM Title III, Chapter 10, Part B. See also, specific index headings, Chapters 3 - 13 of Title IV, Relocation.

CHAPTER 3

TRAVEL OF EMPLOYEE AND IMMEDIATE FAMILY

A. AUTHORITIES

Statutory authorities (3-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5723(a)(1), effective the date of enactment, to include a Presidential appointee whose appointment requires Senate confirmation and whose rate of pay equals or exceeds the minimum pay of grade GS-16.

B. ELIGIBILITY

Incident to relocation

Shortage category appointment (3-2)

Travel orders of Navy civilian employee, filling a manpower shortage position, limited reimbursement for first duty station travel by privately owned automobile (POA) to the constructive cost of commercial air. Both the Federal Travel Regulations (FTR) and 2 Joint Travel Regulations (2 JTR), however, state that use of POA for such travel is advantageous to the Government. Where the applicable regulations prescribe payment the claim must be allowed, regardless of the wording of the travel orders. See FTR 2-2.3a; 2 JTR C2151(3). Dominic D. D'Abate, B-210523, October 4, 1983 (63 Comp. Gen.__).

Return from overseas assignment (3-3)

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental to separation and should commence within reasonable time thereafter. Employee who resigned position effective October 2, 1981, notified agency on March 2, 1982, of intent to return to former place of residence commencing on September 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement. Consuelo K. Wassink, 62 Comp. Gen. 200 (1983).

Break in service (3-4) (New)

Where the record does not establish that prior to an employee's reporting to his duty station there was a clear intent by the agency that relocation expenses were to be paid and that the change of duty station was to be accomplished without a break in service, there is no basis to authorize a retroactive adjustment of the employee's separation date to avoid a break in service prior to his reporting to the new duty station to permit the payment of travel relocation expenses. Greg T. Montgomery, B-196292, July 22, 1980, affirmed on reconsideration, B-196292, June 6, 1983.

Temporary employee was offered and accepted a permanent position with the Forest Service in Alaska while serving in California. The appointment was deferred due to hiring freeze of January 1981. He was then offered a temporary position in Alaska pending lifting of freeze. He resigned his position, had a break in service from March 14 to 25, 1981, and traveled at his own expense to accept the temporary appointment. After hiring freeze was lifted, employee was again offered permanent appointment. He accepted and his temporary appointment was converted to a permanent one. Claimant, because of break in service, may be reimbursed travel and transporation expenses as a new appointee in traveling to accept a temporary position at a post of duty outside the continental United States under 5 U.S.C. § 5722 (1976), even though travel authorization has not been issued. Robert E. Demmert, B-207030, September 21, 1983.

Immediate family

"Spouse"--case notes (3-6)

Occupational separation--An employee and his wife maintained separate residences for 2 years. Because separation was not due to the dissolution of the marriage and because the parties have reestablished a common household at the employee's new permanent duty station, the wife should be considered a member of the employee's household at the time of his transfer. Thus, he is eligible to receive relocation allowances for expenses incurred by his wife when she joined him at his permanent duty station. Robert L. Rogers, B-209002, March 1, 1983.

"Children"--case notes

Children under age twenty-one (3-8)

Custody after transfer

After an employee transferred to his new duty station, he was awarded custody of his brother's four children. The employee incurred travel and temporary living expenses in moving the children to his new duty station. Expenses for the childrens' travel to the new station may not be paid since they were not members of the employee's immediate family within the meaning of FTR para. 2-1.4d at the time the employee reported to his new duty station. James H. Woods, B-206456, March 25, 1983.

F. TRANSPORTATION EXPENSES

Mode of Travel, generally

Travel by more than one POV

Justification (3-19)

Personal effects--Agency properly denied employee reimbursement for use of two vehicles where employee lacked justification for use of second vehicle under paragraph 2-2.3e(a) of the Federal Travel Regulations. Either employee's or his spouse's vehicle could have transported both with luggage. Use of a second vehicle may not be justified on the basis of a general statement that the vehicles were used to transport personal belongings. Donald F. Daly, B-209873, July 6, 1983.

G. PER DIEM

Per diem not extended

Early delivery--POV shipment (3-32) (New)

Civilian employee of the Department of Defense is not entitled to additional per diem for travel by privately owned vehicle in connection with a permanent change of station from the United States to an overseas post since he has already received the maximum amount allowed under the

regulations for that portion of his travel. The fact that he left his former duty station early to deliver his automobile to the port for shipment does not permit the increase in the number of days authorized for per diem payments under the applicable regulations. Warren Shapiro, B-208590, November 24, 1982.

CHAPTER 4

MISCELLANEOUS EXPENSES

B. ELIGIBILITY

Incident to change of official station

Early reporting for duty (4-3) (New)

Because regulations and amended regulations both unambiguously define "effective date of transfer" as the date a transferring employee reports for duty at his new official station, an employee who reported for duty prior to the effective date of amended regulations may not be paid an increased miscellaneous expense allowance. Effective date indicated on Form SF-50 is not determinative of effective date of transfer. Robert A. Motes, B-210953, April 22, 1983.

G. REIMBURSABLE EXPENSES

Waterborne residence-related expenses (4-15) (New)

Sailboat

Employee may be reimbursed in connection with the occupancy of a sailboat as a residence upon transfer of station those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the connection of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b. Adam W. Mink, 62 Comp. Gen. 289 (1983).

Floathouse

Forest Service employee transferred to a new permanent duty station may be reimbursed as a miscellaneous expense the cost of setup of his floathouse as his residence to the extent it is analogous to costs incurred incident to the relocation of a mobile home. However, costs of insurance may not be reimbursed. James H. McFarland, B-209998, April 22, 1983.

Licenses

Teacher certification; course tuition fees (4-17) (New)

Under Federal Travel Regulations para. 2-3.1, miscellaneous expenses incurred because of a transfer, an employee may be reimbursed for (1) his wife's teacher certification fee as a license fee, and (2) his wife's teacher course tuition fee which was required as a condition precedent to the issuance of the teacher certification, where employee's wife had been a certified teacher in state in which old duty station was located. Donald W. Haley, B-201572, July 26, 1983.

H. NONREIMBURSABLE EXPENSES

Real estate related expenses

Option to purchase (4-21) (New)

Under a lease with an option to purchase a transferred employee forfeited the $1,000 amount paid as consideration for the option because she had not exercised the option to purchase before she was transferred. The forfeited amount may not be reimbursed as an item of miscellaneous expense, since the evidence does not establish that the transfer was the proximate cause of the forfeiture. Lillie L. Beaton, B-207420, February 1, 1983.

Commission on sale of personal property

Sale of horse and equipment (4-26) (New)

An employee on permanent change of station transfer, sold his personally owned horse and equipment, which was used in official Government business, and claims reimbursement for the cost of selling it. Reimbursement is denied since paragraphs 2-3.1(c)(1) and (9) of the Federal Travel Regulations specifically excludes from that coverage losses and costs incurred in selling personal property, and a horse has been deemed to be personal property. Richard D. Knight, B-212688, December 16, 1983.

Medical records transfer fee (4-26) (New)

Under Federal Travel Regulations para. 2-3.1, miscellaneous expenses incurred because of a transfer may be reimbursed, but those costs incurred for reasons of personal taste or preference and not required because of the move may not be reimbursed. The employee may not be allowed reimbursement of a medical records transfer fee, since transmittal fees are reimbursable only when the subject of the transmittal is a reimbursable expense, and expenses relating generally to medical arrangements of transferred employees are not reimbursable. Donald W. Haley, B-201572, July 26, 1983.

CHAPTER 5

TRAVEL TO SEEK RESIDENCE QUARTERS

E. NATURE OF TRIP

One trip

Children (5-8)

Child care expenses--Transferred employee's claim for reimbursement of child care expenses incurred at old duty station during period of spouse's house-hunting trip may not be paid since neither 5 U.S.C. § 5724(a)(2) (1976), nor Chapter 2, Part 4 of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), authorize such an entitlement. William D. Fallin, B-210468, April 12, 1983.

CHAPTER 6

TEMPORARY QUARTERS SUBSISTENCE EXPENSES

A. AUTHORITIES

Statutory authority (6-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724a(3), effective the date of enactment, to increase to 60 days the period during which temporary quarters subsistence expenses of the employee and his immediate family may be reimbursed when the new station is within the U.S. territories or possessions. It also authorizes an extention of that time up to an additional 60 days upon agency determination of compelling reasons for continued temporary quarters occupancy.

E. OCCUPANCY OF TEMPORARY QUARTERS

Occupancy incident to transfer

Occupancy caused by delay in en route travel (6-9)

Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since the employee's rights are limited by 5 U.S.C. § 5724a to an appropriate per diem allowance rather than temporary quarters expenses, for the period of actual travel en route to the new station, if agency approved. Robert T. Bolton, 62 Comp. Gen. 629 (1983). See also Chapter 3, Part G of CPLM Title IV.

Children residing apart (6-11)

Children with relatives--The consecutive 30-day maximum period for temporary quarters subsistence expenses does not run during the period that an employee is on temporary duty travel and his minor son lives with relatives. For the purpose of subsistence expenses and the 30-day limitation, the son did not occupy temporary quarters while residing with relatives, since his stay with them was not incident to

a transfer of permanent duty stations. James E. Massey, B-207123, December 14, 1982. See also Part F, "Period interrupted" (6-28) of CPLM, Title IV.

Quarters that are not temporary

Occupancy of residence at old station

Short-distance transfers (6-21) (New)

Employee, who was transferred to new duty station 36 miles from old duty station, claims subsistence expenses while occupying temporary quarters at old duty station. Employee is not entitled to payment of temporary quarters since the distance between his new official station and old residence is not more than 40 miles greater than the distance between his old official station, as required by paragraph 2-5.2h of the Federal Travel Regulations. Jack R. Valentine, B-207175, December 2, 1982.

H. REIMBURSABLE EXPENSES

Fraudulent claims (6-38) (New)

A fraudulent claim for lodgings or meals taints entire claim for an actual subsistence expense allowance for any day on which a fraudulent claim is submitted. Therefore, employee's claim for temporary quarters subsistence expenses for 30 days is denied in its entirety since employee misrepresented his actual daily lodging expenses and his daily food expenses. See decisions cited. Fraudulent Travel Voucher, B-212354, August 31, 1983.

CHAPTER 7

RESIDENCE TRANSACTION EXPENSE

SUBCHAPTER I -- ENTITLEMENT

A. AUTHORITIES

Statutory authority (7-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724a(a)(4), effective the date of enactment, to limit expenses of residence sale at old official station to 10% of sale price, not to exceed $15,000, and expenses of residence purchase at new official station to 5% of purchase price, not to exceed $7,500. Additionally, maximum dollar amount may be increased effective October 1 of each year thereafter based on percentage change in the Consumer Price Index published for December of the preceding year over the Index published for December of the second preceding year. See Part E, "Maximum Amount of Reimbursement", page 7-32 of this chapter of CPLM, Title IV.

D. TRANSACTIONS COVERED

Purchase of residential property (7-7)

Where an employee purchased two dwellings on 50 acres of land, agency should have prorated the real estate purchase expenses even though the second dwelling was not habitable. The proration requirement of paragraph 2-6.1f of the Federal Travel Regulations applies even in the case of a single dwelling where the employee purchases a parcel of land in excess of that reasonably related to the residence site. James W. Thomas, B-212326, November 29, 1983.

Forfeiture of deposit (7-11)

Employee transferred to new duty station and contracted to purchase residence there. When agency delayed establishment of new office at this duty station, employee, due to uncertainty of the situation, chose to forfeit deposit on residence. Since agency delay appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense. Marvin K. Eilts, B-212560, December 5, 1983 (63 Comp. Gen. ____).

Under a lease with an option to purchase agreement a transferred employee forfeited the $1,000 amount paid as consideration for the option because she had not exercised the option to purchase the leased residence before she was transferred. A mere right to purchase under an option does not confer title to a residence so as to justify real estate sale expenses, which in any event would not include expenses in the nature of a forfeited deposit. Lillie L. Beaton, B-207420, February 1, 1983.

Expenses paid by third party (7-11) (New)

Transferred employee seeks reimbursement of real estate expenses incurred in sale of residence at old duty station. Expenses claimed were paid by wife's employer. Since the claimed expenses were actually paid by a third party, not by the transferred employee, no entitlement to reimbursement exists under para. 2-6.1f of Federal Travel Regulations. Lawrence F. Miller, B-208817, January 18, 1983.

E. Specific conditions of entitlement

Occupancy of residence when notified of transfer

Exceptions

Successive transfers (7-17)

Employee transferred from Denver to Phoenix and then back to Denver and sold Denver residence within the 1 year from effective date of first transfer but subsequent to retransfer. Subsequent transfer does not extinguish the right to reimbursement created by the initial transfer and since real estate sale expenses were incurred prior to prospectively applicable holding in Matter of Shipp, 59 Comp. Gen. 502 (1980), reimbursement is not limited to expenses incurred prior to notice of retransfer or those which could not be avoided. Adolph V. Cordova, B-207728, January 13, 1983.

Settlement date limitation

Computation of time period

FTR amendment inception date (7-26) (New)

Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of

station on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station. The amendment to FTR para. 2-6.1e, allowing 1-year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to August 23, 1982. James H. Gordon, 62 Comp. Gen. 264 (1983); Richard J. Walsh, B-210862, June 9, 1983.

30-day grace period extension (7-26) (New)

The Federal Travel Regulations (FTR) were amended in 1982 to allow agencies to extend the 2-year period to complete residence transactions, provided the transferred employee requests an extension within 30 calendar days after the expiration of the 2-year period and the 30-day period is specifically extended by the agency. We conclude the amendment authorizes agencies to extend the 30-day period for requests on an individual basis. Hence, the Department of Health and Human Services may extend the 30-day period for an employee who was not informed of the FTR amendment or of the new time limit on requesting an extension. Sara B. Harris, B-212171, September 27, 1983.

Expenses customarily paid

Fees paid to a lender (7-27) (New)

An employee may not be reimbursed for the messenger service and tax certificate fees paid if those fees were paid to the lender in connection with the sale of employee's home at his old duty station. When the facts and documentation presented with a claim are insufficient to establish the exact nature of these fees, in the absence of more specific information, the amounts may not be reimbursed. Patrick T. Schluck, B-202243, July 6, 1983.

SUBCHAPTER II--REIMBURSABLE EXPENSES

E. TITLE EXAMINATION AND INSURANCE

Paid for by seller (7-41)

Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement for title insurance fee on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement. Roger L. Flint, 62 Comp. Gen. 426 (1983).

F. ATTORNEYS' FEES AND LEGAL EXPENSE

Rule for settlements after April 27, 1977

More than one attorney (7-44)

An employee incurred an attorney's fee for closing on a lot on which he built his residence, and another attorney's fee for a construction contract for that residence. The Federal Travel Regulations limit reimbursement to expenses comparable to those reimbursable in connection with the purchase of existing residences and does not include expenses which result from construction. Since the attorney's fee for the construction contract was incurred because he chose to build a residence as opposed to purchasing an existing one, and since he has already been reimbursed an attorney's fee for closing on the lot, he may not be reimbursed the fee for the construction contract. Robert W. Webster, B-212427, November 29, 1983 (63 Comp. Gen. ____).

Equitable title "land contracts" (7-45) (New)

An employee entered into a "land contract" for purchase of a residence and sought reimbursement for payment of related attorneys' fees. Paragraph 2-6.1c of the FTR sets out the title requirements that must be met before reimbursement of real estate expenses is authorized. A "land contract" providing for installment payments, for immediate legal possession and occupancy, and for conveyance of the deed

upon payment of the full price, vested the employee as purchaser with equitable title sufficient for reimbursement purposes. Joseph F. Rinozzi, B-206852, March 9, 1983.

G. FINANCE CHARGES

Rule following Regulation Z

Exclusions from finance charges

Second recording fee (7-53) (New)--Under para. 2-6.2d of the Federal Travel Regulations, expenses which result from construction of a residence may not be reimbursed. Since the claimant has been reimbursed the recording fee for the purchase of the lot, he cannot also be reimbursed the recording fee for construction of his new residence as that fee results from construction. Robert W. Webster, B-212427, November 29, 1983 (63 Comp. Gen. ___).

Mortgage application rejection (7-56) (New)--A transferred employee incurred expenses for a credit report and appraisal in connection with his attempt to purchase a residence at his new duty station. The employee was unable to purchase the residence since the lending institution rejected his application for a mortgage loan. Claim for the cost of the credit report and appraisal are disallowed because only expenses incurred incident to completed residence sale or purchase transactions are reimbursable real estate expenses. Paul M. Foote, B-210566, March 22, 1983.

Loan closing fee (7-56) (New)--Two transferred employees incurred finance charges in the form of loan closing fees. Although, in each instance, the lender states that the fee does not constitute a finance charge, the Government is not bound by a lending institution's characterization of a payment, but must examine the charge against Regulation Z (12 C.F.R. § 226.4 (1982)). Since there is no itemization of specific expenses included in the loan closing fees, and lump-sum loan fees generally are regarded as nonreimbursable finance charges under Regulation Z, the employees' claims may not be paid. Taylor and Keyes, B-208837, December 6, 1982; and William R. Pierson, B-209691, May 9, 1983.

Loan origination fee (7-56) (New)

Employee may be reimbursed the loan origination fee incurred incident to purchasing a house on December 1, 1982, at his new duty station since revised paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, specifically authorizes reimbursement for such a fee. Robert E. Kigerl, B-211304, July 12, 1983 (62 Comp. Gen. ____).

Effective October 1, 1982, the Federal Travel Regulations authorize reimbursement of loan origination fees for a transferred employee purchasing a house. Such a fee, however, may be reimbursed only if bona fide and only to the extent the fee does not exceed amounts customarily paid in the locality of the residence. Furthermore, the total reimbursable expense in connection with the purchase of a residence, including the loan origination fee, is subject to an overall limitation of 5 percent of the purchase price or $5,000, whichever is less. Patricia A. Grablin, B-211310, October 4, 1983. See Chapter 7, Subchapter I, Part A of this supplement of CPLM, Title IV, regarding maximum dollar amount change.

Investigating and processing fee (7-56) (New)

Tranferred employee paid a lump-sum, 1 percent investigating and processing fee of $794 on mortgage loan to lending institution in connection with purchase of residence at new duty station. While the fee was stated to be a loan origination fee, it is a finance charge within the meaning of Regulation Z (12 C.F.R. Part 226), reimbursement of which is precluded, absent itemization to show that items are excluded from the definition of a finance charge by 12 C.F.R. § 226.4(e). Harvey C. Varenhorst, B-208479, March 16, 1983; and James C. Troese, B-211107, June 10, 1983.

H. MORTGAGE PREPAYMENT COSTS

Old mortgage refinanced--new residence purchase (7-58) (New)

Transferred employee obtained money from a new mortgage on his old residence to make downpayment on purchase of residence at new official station. Buyers of old residence assumed the new mortgage, and employee used proceeds to pay off existing land con-

tract, pay closing costs, and make downpayment on residence purchased at new duty station. Transaction to primarily obtain funds to make downpayment was not an "interim personal financing loan" but a loan secured by employee's interest in old residence, and part of total financial package for purchase of new residence. Hence, expenses of mortgage determined by agency to be reasonable and customary are reimbursable. James R. Allerton, B-206618, March 8, 1983; and Charles A. Onions, B-210152, June 28, 1983.

I. TAXES

State Grantor Tax (7-60) (New)

Transferred employee may not be reimbursed for a State Grantor's Tax paid by him on behalf of a seller in connection with the purchase of a new residence. Although it may be common for a buyer to pay the Grantor's Tax, the local HUD office has determined that it is customary for the seller to pay such cost in that particular area. Christopher S. Werner, B-210351, May 10, 1983.

K. OTHER RESIDENCE TRANSACTION EXPENSES

Capital improvements (7-67) (New)

An employee was required to pay off a paving lien placed on his old residence when he sold his residence incident to his transfer. Since the paving lien was placed on the property because of improvements made to street adjacent to the property it may not be reimbursed under the Federal Travel Regulations. It is analogous to a capital improvement to the property itself, and will be treated in the same manner. V. Stephen Henderson, B-207304, April 15, 1983.

M. LEASE TRANSACTIONS

Duty to minimize termination costs

Reimbursement permitted (7-69)

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4-1/2 month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's

finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality. Norman B. Mikalac, 62 Comp. Gen. 319 (1983).

CHAPTER 8

TRANSPORTATION OF MOBILE HOMES

A. AUTHORITIES

Statutory authority (8-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724(b)(1), effective the date of enactment, to eliminate the statutory mileage rate ceiling and reframe it as a "reasonable allowance" to be administratively determined and set by the Federal Travel Regulations.

D. MOBILE HOMES SUBJECT TO SHIPMENT

New mobile home

Ownership requirement

Sailboat (8-3) (New)

An employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported. Adam W. Mink, 62 Comp. Gen. 289 (1983).

Floathouse (8-3) (New)

Forest Service employee may be reimbursed for the cost of commercially towing his floathouse to his new permanent duty station in Alaska for use as his residence under the provisions of 5 U.S.C. § 5724(b)(2), which permits the transportation of a mobile dwelling at Government expense. James H. McFarland, B-209998, April 22, 1983.

CHAPTER 9

TRANSPORTATION OF HOUSEHOLD GOODS

A. AUTHORITIES

Statutory authority (9-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724(a)(2), effective the date of enactment, to authorize the increase of an employee's household goods and personal effects for transportation purposes to 18,000 pounds.

D. DEFINITION OF "HOUSEHOLD GOODS"

Items included (9-9) (New)

Bicycle trailer

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as a "household good" as defined in paragraph 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as a household good. Guy T. Easter, B-207967, November 16, 1982.

E. WEIGHT LIMITATION

Applicable weight limitation

Application regardless of mode of shipment (9-13)

Employee who made his own arrangements and shipped his own household goods on October 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after the fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for

excess cost if they choose to move their own household goods. However, cost of insurance must be recouped. John S. Phillips, 62 Comp. Gen. 375 (1983).

Liability for excess weight

Collection from employee (9-15)

Employee who moved his household goods incident to a transfer, knew he would be liable for excess weight charges. He claims the difference between the overweight charges as represented to him based on rates effective in May and the overweight charges actually charged under new rates effective in June when the shipment was made. The overweight charges the mover billed were correct and the mover was required by the Interstate Commerce Act to collect them. Since the Federal Travel Regulations required collecting from the employee any excess weight charges it paid, there is no basis for allowance of the claim. Theron M. Bradley, Jr., B-210561, September 13, 1983.

Employee who was transferred incident to a reduction in force may not be relieved of cost of shipping household goods in excess of his authorized weight. Although reduction-in-force action that resulted in transfer was cancelled, the Government may not incur charges for the cost of shipping goods in excess of weight authorized by 5 U.S.C. § 5724(a). Henry R. Rodoski, B-209953, May 18, 1983.

Determining weight

Evidence of weight

Weight certificates

Discrepancies (9-19)

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not mean that the Government may not claim excess

weight costs in the move; rather, a constructive shipment weight should be obtained under paragraph 2-3.2b(4) of the Federal Travel Regulations. James C. Wilson, 62 Comp. Gen. 19 (1982), affirmed on reconsideration, B-206704, August 8, 1983.

Transferred employee was assessed weight charges for 3,300 pounds over the statutory maximum household goods shipment of 11,000 pounds. The employee argues that the weight certificates were invalid because of the discrepancy between the trailer license numbers on the tare and gross weight certificates, and thus the agency was in error in paying the carrier. The discrepancy in trailer numbers, without additional evidence, does not indicate that the weight certificates were clearly in error so as to overrule the agency's determination of correctness. Claim for reimbursement of excess weight costs is denied. Norman Subotnik, B-206698, November 30, 1982.

Constructive weight

Determined by carrier (9-22)

To correct error resulting from invalidation of weight certificates the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under paragraph 2-8.2b(4) is unobtainable the weight of the shipment must be determined by other reasonable means. Here mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight. James C. Wilson, 62 Comp. Gen. 19 (1982), affirmed on reconsideration, B-206704, August 8, 1983.

G. ORIGIN AND DESTINATION OF SHIPMENT

To other than new duty station (9-27)

Employee who was transferred to new official duty station did not transport his household goods from the old station

until nearly 1 year after his transfer, when he accepted a private sector position in another location. Employee is entitled to transportation expenses since he remained in Government service for 12 months after the effective date of his transfer, and transportation of his goods was begun within the 2-year limitation period specified by paragraph 2-1.5a(2) of the Federal Travel Regulations. Reimbursement of transportation expenses to a place other than the new duty station is authorized by FTR para. 2-8.2d, with the cost limited to the constructive cost of shipping the employee's goods to the new station. William O. Simon, Jr., B-207263, April 14, 1983.

I. TRANSPORTATION WITHIN THE U.S.

Commuted-rate system

Determining method of reimbursement (9-36) (New)

Employee of Department of Energy made his own arrangements and shipped his household goods on October 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from GSA after the fact in December 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective December 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a GBL. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed. John S. Phillips, 62 Comp. Gen. 375 (1983).

Employee who was authorized shipment of household goods incident to a permanent change of station is limited to the actual expenses of that shipment in this case. Since transportation by Government Bill of Lading would have been less costly than reimbursement under the commuted rate system, 41 C.F.R. § 101-40.206 requires that reimbursement be limited to the low-cost Government mover. However, where agency failed to comply with requirement to make cost determination before shipment of household goods, employee

may be reimbursed actual expenses not to exceed the amount that would be allowable under the commuted rate system. Donald F. Daly, B-209873, July 6, 1983.

Actual expense method

Cost reimbursement limitation (9-37)

Collateral movement to storage--A transferred employee who moved his own household goods was reimbursed for actual expenses since there was insufficient documentation to pay him under the commuted rate method. He may be reimbursed the additional expense he incurred in hiring a moving company to move certain items of furniture into a loft area of his house. That expense may be reimbursed as part of the actual cost of transporting his household goods. See 48 Comp. Gen. 115 (1968). Robert D. Maxwell, B-207500, October 20, 1982.

Ancillary charges (9-38) (New)

Employee whose household goods were shipped under the actual expense method must repay Government for charge by carrier for snow removal. It is the employee's responsibility to provide the carrier access to his household goods and thus to see that his driveway is passable. Albert L. Kemp, Jr., B-209250, April 12, 1983.

CHAPTER 10

STORAGE OF HOUSEHOLD GOODS

SUBCHAPTERS I & II--TEMPORARY & NONTEMPORARY STORAGE

A. AUTHORITIES

Statutory authority (10-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5726, effective the date of enactment, to increase the weight of household goods, and personal effects to 18,000 pounds for storage purposes.

CHAPTER 13

RELOCATION OF FOREIGN SERVICE OFFICERS AND OTHERS

D. TRANSPORTATION AND STORAGE OF EFFECTS

Origin and destination of shipment

Time limitation (13-13) (New)

The spouse of a Foreign Service officer who died while stationed in Washington, D.C., was entitled to transportation of her household effects to the place where the family will reside, but by regulation such transportation was required to take place within a maximum of 18 months after the officer's death. The widow may not be granted a further extension of time by action of the Committee on Exceptions to the Foreign Service Travel Regulations. Teresita G. Bowman, B-212278, September 2, 1983.

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CIVILIAN PERSONNEL LAW MANUAL

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UNITED STATES GENERAL ACCOUNTING OFFICE

OFFICE OF GENERAL COUNSEL

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FOREWORD

In June of 1983, the Second Edition of the Civilian Personnel Law Manual was issued. It reflects Comptroller General decisions of the General Accounting Office issued through September 30, 1982. We now issue the 1984 Supplement to the Second Edition of the Civilian Personnel Law Manual, covering Comptroller General decisions from October 1, 1982 to December 31, 1983.

The 1984 Supplement follows the same format as the Second Edition of the Civilian Personnel Law Manual--an Introduction and four titles: Title I-Compensation, Title II-Leave, Title III-Travel, and Title IV-Relocation. Each unit has been separately bound, but wrapped together for distribution purposes. Each unit of the 1984 Supplement can be filed with the corresponding unit of the Second Edition of the Civilian Personnel Law Manual.

As always, we welcome any comments that you have regarding any aspect of the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement. We hope that it will be a useful source of information concerning our personnel law decisions.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

April 1984

INTRODUCTION

PART I

Administrative basis of claims adjudications (3)

Record Retention (New)

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from the General Accounting Office. See, 44 U.S.C. § 3309. Retention of Time and Attendance Records, 62 Comp. Gen. 42 (1982).

Jurisdictional limitations and policy considerations (5)

Res judicata (New)

An employee sought a Comptroller General decision on his entitlement to salary retention. The General Accounting Office adheres to the doctrine of res judicata to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the General Accounting Office. 47 Comp. Gen. 573 (1968). Since in William C. Ragland v. Internal Revenue Service, Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits; the General Accounting Office did not consider his claim for salary retention. William C. Ragland, B-204409, May 23, 1983.

Foreign Service Grievance Board (New)

An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under former 22 U.S.C. § 1037a, for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to the General Accounting Office for review and decision. Under former 22 U.S.C. § 1037a(13), such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, the General Accounting Office is without jurisdiction to review the Board's decision in this case. Pierre L. Sales, B-212601, September 20, 1983, 62 Comp. Gen. ____ (1983). The Foreign Service Act of 1980, Pub. L. 96-465, § 2205(1), 94 Stat. 2071, 2159 (1980) repealed these provisions effective February 15, 1981.

Other substantive jurisdictional issues

Waiver of claims of U.S. for erroneous payments of pay and allowances (9)

A travel advance outstanding and not liquidated at the time of a former employee's retirement is not an overpayment of pay or allowances and, therefore, could not be considered for waiver under the authority of 5 U.S.C. § 5584. Under 5 U.S.C. § 5705, and given the Government's right as a creditor to use monies due the individual to reduce or extinguish a debt due the Government, expenses due the former employee for invitational travel performed subsequent to his retirement were subject to setoff against indebtedness for his unliquidated travel advance. Charles E. Clark, B-207355, October 7, 1982.

INTRODUCTION

PART II

GAO RESEARCH MATERIALS AND FACILITIES

GAO Civilian Personnel Law Manual (11)

Copies of the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement are available from the Superintendent of Documents, U.S. Government Printing Office, 941 North Capital Street, Washington, D.C. 20402. Further information regarding the Second Edition of the Civilian Personnel Law Manual or its 1984 Supplement may be obtained by contacting:

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Title I • Compensation

OFFICE OF GENERAL COUNSEL
U.S. GENERAL ACCOUNTING OFFICE

CHAPTER 1

CIVILIAN PAY SYSTEMS

C. SENIOR EXECUTIVE SERVICE

Performance awards (1-6)

Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. § 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____.

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. § 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. § 5383(b). If a bonus was paid by Treasury check dated on or after October 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before October 1, 1982. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ___.

Meritorious and Distinguished Executive Awards (1-6)

Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. § 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. § 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after October 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before October 1, 1982. Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____.

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CHAPTER 3

BASIC COMPENSATION

SUBCHAPTER I -- COMPUTATION

B. BIWEEKLY PAY PERIODS AND HOURLY RATES (3-3)

Computation of pay -- statutory changes (New)

Effective with respect to pay periods beginning in fiscal years 1984 and 1985, and applicable in the case of an employee as defined in 5 U.S.C. § 5504(b) (1982), any hourly rate derived under 5 U.S.C. § 5504(b)(1) (1982) shall be derived by dividing the annual rate of basic pay by 2,087 rather than 2,080. This statutory change is applicable only during fiscal years 1984 and 1985, but is not applicable in determining basic pay for civil service retirement purposes. See § 310(b) of the Omnibus Budget Reconciliation Act of 1982, Pub. L. 97-253, 96 Stat. 763, 799 (1982), as amended by § 3(1) of the Act of October 15, 1982, Pub. L. 97-346, 96 Stat. 1647, 1649 (1982), 5 U.S.C. § 5504 note (1982).

In regard to members of the Senior Executive Service (SES), we note that under 5 U.S.C. § 5504(a) they are paid at biweekly intervals. They are not, however, included under the provisions of 5 U.S.C. § 5504(b) (1982) which establish the procedures for determining the hourly, daily, weekly, or biweekly rates of pay for all other employees paid on a biweekly basis, and no other statute establishes a method to compute their pay. By regulation, OPM has determined that SES members should have their pay computed in the same manner as other employees paid on a biweekly basis. See 5 C.F.R. § 534.404(a) and (b), as amended by 49 Fed. Reg. 2879 (January 24, 1984).

SUBCHAPTER II--ESTABLISHMENT OF COMPENSATION INCIDENT TO CERTAIN PERSONNEL ACTIONS

C. PROMOTIONS AND TRANSFERS (See also Chapter 7, Employee Make-Whole Remedies.)

Effective date

Exceptions (3-12)

Criteria for proper revocation of promotions before effective date (New)

Ten employees of Merit Systems Protection Board were selected for promotion effective December 13, 1981.

Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These 10 promotions were not properly revoked before they became effective and are retroactively effective on December 13, 1981. Eight employees of the Merit Systems Protection Board were selected for promotion effective December 27, 1981, or later. Due to budget cuts, the Managing Director announced on December 16 that all promotions would be suspended. These promotions were effectively revoked, even though written notification was not issued until December 29. There is no basis to allow retroactive promotions for these eight employees. Mitchell J. Albert, B-208406, July 15, 1983.

Highest previous rate rule

Agency regulation and policy (3-15)

Employee, who was serving in a temporary position following a reduction-in-force, was released by the agency when her temporary appointment expired. Employee was later reemployed by agency following a service break, in a grade previously held, but at step 1 of grade. Employee claims entitlement to retroactive step adjustment and backpay to step 9, the highest step of grade previously held. Use of highest previous rate is discretionary on agency's part, there being no employee-vested interest in that higher step upon reemployment in absence of regulation so providing. In view of existing agency policy that highest previous rate would only apply to reappointments without a service break, agency action was proper. Irene Sengstack, B-212085, December 6, 1983.

"Two-step increase" rule (3-23)

Promotion or transfer between General Schedule and other pay systems (New)

An employee hired by the Architect of the Capitol pursuant to 2 U.S.C. § 60e-2a is not entitled to have his salary calculated with reference to the "two-step increase" rule, 5 U.S.C. § 5334(b), when he is appointed to a General Schedule position with the Department of Energy. The "two-step increase" rule, 5 U.S.C. § 5334(b), pertains only to transfers and promotions within the General Schedule system, and employees hired by the Architect of the Capitol under 2 U.S.C. § 60e-2a are not within the General Schedule. Thus, employee's salary was correctly adjusted in accordance with the "highest previous rate" rule, 5 U.S.C. § 5334(a). Charles L. Steinkamp, B-208155, April 15, 1983.

E. GRADE AND PAY RETENTION

Decisions under the Civil Service Reform Act of 1978 (3-31)

Cost-of-living allowance (New)

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

Equivalent increase (New)

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. § 531.403 (1982). Eric E. Bahl, B-209414, December 7, 1983, 63 Comp. Gen. ____, reversing Eric E. Bahl, 62 Comp. Gen. 151 (1983).

Promotion in violation of merit system principles (New)

General Services Administration requests reconsideration of decision Paul W. Braun, B-199730, July 31, 1981, contending that Mr. Braun is entitled to grade retention under 5 U.S.C. § 5362. We sustain our July 31, 1981, decision and reject the agency's contention concerning grade retention. Mr. Braun is not entitled to grade retention because the Office of Personnel Management found his promotion to the GS-15 position to have been in violation of merit system principles and ordered GSA to cancel the improper promotion. Paul W. Braun, B-199730, January 18, 1983.

SUBCHAPTER III--STEP INCREASES

A. PERIODIC STEP INCREASES

Equivalent increase

Promotion following demotion (3-36)

Editor's Note: The cases cited in the main volume under this subsection arose before the Civil Service Reform Act of 1978).

Promotion following demotion--cases arising after the Civil Service Reform Act of 1978 (New)

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. § 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. § 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. § 531.403 (1982). Eric E. Bahl, B-209414, December 7, 1983, 63 Comp. Gen. ___, reversing Eric E. Bahl, 62 Comp. Gen. 151 (1983).

CHAPTER 4

ADDITIONAL COMPENSATION FOR CLASSIFICATION ACT POSITIONS

SUBCHAPTER I--PREMIUM PAY--OVERTIME

B. OVERTIME UNDER 5 U.S.C. § 5542

What are compensable hours of work

Actual work requirement (4-4)

Fitness for duty examination (New)

Although time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under FLSA, such time is not hours of work under 5 U.S.C. § 5542. David Ehrich, B-209768, July 15, 1983.

Military and court leave (4-5)

Decision denying claim of employee for overtime compensation for period he was away on military leave is reversed. Claim was denied because although overtime was regularly scheduled, it was not clear that employee would have been required to work the overtime involved. Newly submitted evidence shows that employee would have been required to work and his claim is therefore allowed. Howard L. Young, B-202864, September 2, 1983, reversing B-202864, August 10, 1982, cited at 4-5 in main volume.

While traveling

Within duty station (4-9)

Employees of Social Security Administration are not entitled to overtime compensation under 5 U.S.C. § 5542(b)(2), for time spent traveling in agency-hired buses from one district office to another during the New York City transit strike of April 1980 because all of the offices involved were within the employees' official duty station. Moreover, none of the conditions specified in 5 U.S.C. § 5542(b)(2)(B) were satisfied. Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

Lunch periods (4-25)

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

C. OVERTIME UNDER FLSA

GAO's authority under FLSA

Claims settlement (4-36)

OPM and FAA propose to settle approximately 2,500 backpay claims for FLSA overtime by paying a compromise amount instead of computing each employee's entitlement based on available Government records. We hold that, where FAA has the necessary records to compute individual backpay entitlements, it may not compromise claims against the United States in the absence of specific statutory authority to that effect. FAA Electronic Maintenance Technicians, B-200112, May 5, 1983.

Effective date of OPM exemption determination (4-37)

Army disputes entitlement of recruiting specialists to retroactive overtime payments under Fair Labor Standards Act (FLSA). Where employees were considered exempt by agency in 1974 but Office of Personnel Management ruled otherwise in 1979, employees are entitled to overtime pay retroactive to 1974, subject to the 6-year statute of limitations. The statute of limitations is tolled only by filing claims in this Office. Jon Clifford, B-208268, November 16, 1982.

Paid absences (4-39)

Lunch Periods (New)

The Office of Personnel Management has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was

established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no bona fide lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., for hours worked in excess of 40 in a week as no offset for lunch breaks may be made. John L. Svercek, 62 Comp. Gen. 58 (1982).

Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et. seq. The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are bona fide--although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are bona fide. Edward L. Jackson, 62 Comp. Gen. 447 (1983).

Fitness for Duty Examination (New)

Employee was ordered to undergo fitness for duty examination which involved tests in a hospital for a period of 3-1/2 days, and he claims overtime compensation for that period. Under 5 C.F.R. § 551.425(b) time spent taking a physical examination that is required for the employee's continued employment with the agency shall be considered hours of work under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 et seq. However, when an employee is in a hospital for the examination, only the actual examination time is credited as hours of work and hours during which the employee is eating, sleeping, etc., are not creditable work hours. David Ehrich, B-209768, July 15, 1983.

Burden of proof, evidence (4-40)

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from GAO. See 44 U.S.C. § 3309. Where an

agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies. Retention of Time and Attendance Records, 62 Comp. Gen. 42 (1982).

Army questions sufficiency of evidence to support retroactive claims of overtime under FLSA. In the absence of official records, employee must show amount and extent of overtime by reasonable inference. Once employee has met the burden of proof, the burden shifts to the agency to rebut the evidence. Jon Clifford, B-208268, November 16, 1982.

Where agency has failed to record overtime hours as required by Fair Labor Standards Act, and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence. Frances W. Arnold, 62 Comp. Gen. 187 (1983).

Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive. Francis W. Arnold, 62 Comp. Gen. 187 (1983).

Traveltime

Outside/within working hours (4-41)

Employees of Social Security Administration are not entitled to overtime compensation under the FLSA for time spent

traveling in agency-hired buses from one district office to another during the New York City transit strike of April 1980 because such travel was home to work travel. The day's work ended before the buses were boarded and it is undisputed that no work and no preliminary or postliminary activities were performed while traveling or upon debarkation from the buses. Local 3369, American Federation of Government Employees, AFL-CIO, B-210697, September 29, 1983.

Effect of Panama Canal Treaty (New)

Panama Canal Commission requests a decision as to whether firefighters employed prior to October 1, 1979, are entitled to overtime pay under the Fair Labor Standards Act (FLSA). The Panama Canal Treaty and section 1231 of the Panama Canal Act state that prior employees transferred to the Commission shall have terms and conditions of employment which are generally no less favorable than prior terms and conditions. We hold that this clause requires continuation of FLSA overtime pay to Commission firefighters employed prior to October 1, 1979, since otherwise they would suffer a significant, protracted reduction in pay which would operate as a virtual nullification of the "grandfather" clause for them. Panama Canal Commission, B-205126, February 28, 1983.

D. COMPENSATORY TIME

Discretionary authority to grant overtime (4-45)

Joint submission from agency and union asks whether employees may receive compensatory time off for regularly scheduled overtime work. We hold that both law, 5 U.S.C. § 5543, and regulations, 5 C.F.R. § 550.114, preclude the granting of compensatory time off for overtime other than that which is irregular or occasional. Compensatory Time Off for Regularly Scheduled Overtime, B-212486, October 31, 1983.

Relationship to FLSA (New)

Two nonexempt employees of the Department of the Interior earned overtime for travel under the Fair Labor Standards Act, 29 U.S.C. 201 et seq., but not under title 5, United States Code. Agency attempted to grant compensatory time off in lieu of paying overtime due to a need to conserve available funds. Since there is no authority for granting compensatory time off under the Fair

Labor Standards Act where entitlement to overtime pay accrues solely under the Act, a need to conserve funds does not serve as a basis to permit the granting of compensatory time off in lieu of paying the overtime compensation due. Matter of Barnitt, 58 Comp. Gen. 1 (1978) distinguished. Jacquelyn D. Cruce and Christopher F. Perry, B-207446, November 10, 1982.

Statutory authority for compensatory time off for religious holidays

Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. § 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute. General Services Administration, 62 Comp. Gen. 587 (1983).

SUBCHAPTER II--OTHER PREMIUM PAY

A. NIGHT PAY DIFFERENTIAL

Approval requirements (4-51)

A Customs Service employee was assigned a long-term project lasting nearly 3 years in which a substantial amount of overtime was performed on an almost nightly basis. The fact that the supervisor did not specifically approve the employee's schedule in advance does not bar him from recovering night diffential pay. Considering the regularity of the night work, the long duration of is performance, and the knowledge of the Customs Service that it would be required, we hold that the work was regularly scheduled within the meaning of 5 U.S.C. § 5545(a) and is compensable at night pay rates. Frank Newell, B-208396, March 1, 1983.

B. HOLIDAY PAY (4-52)

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, 62 Comp. Gen. 622 (1983).

C. OVERTIME UNDER FLSA (4-36)

Firefighters (New)

See § 7(k) of FLSA, 29 U.S.C. § 207(k).

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

There is no basis for providing Federal firefighters who attend training with additional compensation where their entitlement to overtime compensation under the Fair Labor Standards Act is reduced due to a shorter tour of duty while attending the training. Overtime Compensation for Firefighters on Temporary Duty, B-211696, September 23, 1983.

G. OVERTIME COMPENSATION FOR SPECIFICALLY NAMED GROUPS OF EMPLOYEES

Customs Service

Computation (4-75)

Customs Inspectors in El Paso, Texas, who previously worked 8-hour shifts claim over-time for 26-month period they work-

ed 8-1/2-hour shifts. Based on the record before our Office, we conclude the plaintiffs are entitled to overtime where the agency has failed to establish that plaintiffs had a duty-free lunch break which may be offset against their claims. The agency failed to meet its burden of proof that a duty-free lunch period was established during the 8-1/2-hour shift where none existed during the 8-hour shift. It appears that lunch periods were scheduled and taken in the same manner when the 8-1/2-hour shift was in effect as when the 8-hour shift was used. Jose Najar, B-213012, November 3, 1983.

Aggregating separate periods of Overtime (New)

Customs Service requests decision whether an inspector's overtime assignments from 9:30 p.m. to 10:30 p.m. Sunday, and from 12:45 a.m. to 1:45 a.m. Monday, may be considered continuous so as to limit his overtime entitlement to 1/2 day's pay for each assignment. We conclude that under current Customs regulations the Monday assignment is not a continuation of the Sunday assignment, and the inspector is entitled to 1-1/2 days' pay for the Monday assignment. Customs Inspectors, B-210442, September 2, 1983.

Federal Aviation Administration (New)

Section 145 of Public Law 97-377, December 21, 1982, which amends 5 U.S.C. § 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to August 3, 1981, as were the original provisions of 5 U.S.C. § 5546a(a) added by subsection 151(a) of Public Law 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history support the view that the amendment made by section 145 is retroactively effective. Federal Aviation Academy Instructors, 62 Comp. Gen. 396 (1983).

SUBCHAPTER III--SEVERANCE PAY AND ALLOWANCES

A. SEVERANCE PAY

Reason for separation

Resignation prior to separation (4-81)

An employee who resigned after he had received only conditional notice that he would be transferred to another commuting area is not entitled to severance pay. Entitlement to severance pay requires that the resignation occur after the employee receives definite notice not depending on the occurence of future events, that he will be separated. There must also be compliance with all regulatory requirements, including the type of notice necessary, which does not include conditional notice. Francis H. Metcalfe, B-207614, December 9, 1982.

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. § 550.701(b)(2) (1982). Ivan Orton, 62 Comp. Gen. 171 (1983).

Reduction-in-force (New)

Certain Department of Housing and Urban development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. § 5533(a). HUD Employees, 62 Comp. Gen. 435 (1983).

Scope of commuting area (New)

Where an employee's claim for severance pay by reason of involuntary separation is based upon the contention that her position was moved to another commuting area, the employee must also establish that she was forced to relocate her residence because of that change in commuting areas. We will not question an agency's determination on commuting area or necessity of relocation unless that determination is arbitrary, capricious, or clearly erroneous. Here, claimant could not establish to the satisfaction of the agency that the change would compel the employee to change her residence to continue employment. We cannot say that the agency's determination was arbitrary, capricious, or clearly erroneous. Hence, claimant's resignation was not involuntary, and her claim for severance pay is denied. Vivian W. Spencer, B210524, June 6, 1983.

Computation of severance pay

Based on pay immediately preceding separation (4-86)

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board. HUD Employees, 62 Comp. Gen. 435 (1983).

Period of entitlement or amount (4-86)

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development Mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601, et seq. (Supp. III, 1979). Enrique Garcia, B-206352, October 1, 1982.

E. MISCELLANEOUS ALLOWANCES

Tropical differential (4-102)

Delay in civilian appointment of discharged service member (New)

Certain employees in Panama are entitled to tropical differential pay if they continuously occupy a position in Panama after discharge from military service. Under agency practice and interpretation of its regulations this requirement was satisfied despite a few days delay after military discharge before civilian employment. Evidently such delay was sometimes administratively unavoidable. However, tropical differential is denied a claimant who delayed his civilian appointment for 22 days to return to the United States for discharge and to transact personal business after military discharge. Richard W. DuMas, B-212352, December 23, 1983.

CHAPTER 5

PAYROLL DEDUCTIONS, DEBT LIQUIDATION, WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

SUBCHAPTER I--PAYROLL DEDUCTIONS AND WITHHOLDING

C. SOCIAL SECURITY AND MEDICARE TAX

Medicare tax (5-7)

Agency properly deducted Medicare tax from the final paycheck of an employee who retired in December 1982, but received the paycheck in January 1983, even though the employee is not eligible for Medicare benefits based on Federal Service. Section 278 of the Tax Equity and Fiscal Responsibility Act of 1982 provides that the tax applies to all remuneration received after December 31, 1982, but provides credit for pre-1983 Federal employment only to individuals who performed service both during January 1983 and before January 1, 1983. Although under these provisions some employees subject to the tax will not be eligible for Medicare benefits, there is nothing in the statute or its legislative history which permits a different result. Edward J. Compos, B-211960, November 29, 1983, 63 Comp. Gen. ____.

D. RETIREMENT (5-8)

Redeposit of contributions (New)

Under 5 U.S.C. 8334(d) payment of interest is required upon redeposit of contributions to the Civil Service Retirement Fund which were refunded to an employee. However, since the Office of Personnel Management has full authority to administer the Civil Service Retirement Act, any question regarding the conditions under which service may be credited for retirement purposes should be referred to that Office. Juan S. Griego, B-207176, January 6, 1983.

Refund of contributions (New)

In order to authorize a refund from the Judicial Survivors' Annuity Fund, other than for absolute retirement, there must be an express statutory provision. The Act of December 5, 1980, Pub. L. No. 96-504, Section 2, 94 Stat. 2741 (amending 5 U.S.C. 8344 (1976)), provides a legal mechanism to allow certain judicial officials the opportunity to reinvest into the civil service retirement plan within a set time. It does not authorize the refund of monies from the Judicial Survivors' Annuity Fund. Judge Gerard L. Goettel, February 11, 1983.

Salary computation for deductions (5-8)

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated on one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

K. GARNISHMENT (5-19)

The case of Employment Development Department v. United States Postal Service, 698 F.2d 1029 (9th Cir. 1983) appears to hold that postal (and federal) employees are shielded from wage garnishment by state tax collectors under 5 U.S.C. § 1755. However, the Supreme Court has noted probable jurisdiction in this case sub. nom. Franchise Tax Board of California v. United States Postal Service, No. 83-372, 52 U.S.L.W. 3509 (January 9, 1984).

SUBCHAPTER II--DEBT LIQUIDATION

F. ALIMONY AND CHILD SUPPORT (5-28)

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case under 5 U.S.C. 5582, the wife would also receive any money due the employee if he is deceased. Wesley E. Pitts, B-207015, December 14, 1982.

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. 1673(b), since under Office of Personnel Mangement Regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

SUBCHAPTER III--WAIVER OF ERRONEOUS PAYMENTS OF COMPENSATION

C. WHAT CONSTITUTES COMPENSATION

Leave

Positive leave balance (5-32)

Employee's annual leave account was erroneously overcredited due to agency's error in calculating service computation date and, thus, the number of hours of leave she was to accrue each pay period. Waiver of the Government's claim to the overcredited annual leave is denied since there was a positive balance remaining in employee's leave account after agency adjusted the account to correct its administrative errors. Although agency erred in overcrediting leave and in delaying correction of the error, employee was also at fault for failing to inquire as to status of the correction. Bessie P. Williams, B-208293, August 15, 1983, affirming B-208293, January 26, 1983.

An employee who was credited excess annual leave because of administrative error must restore that leave to the extent that repayment does not result in a negative leave balance at the end of any leave year. If the employee used erroneously credited leave, repayment of the resulting overpayment of pay may be waived if it appears he did not know, or have reason to know, of the error. If records sufficient to establish the employee's leave record are not available for any period of time it may not be assumed that he used excess leave for purposes of establishing a debt and considering waiver. Thomas C. James, B-211881, December 9, 1983.

Military retired pay (5-34)

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government. 5 U.S.C. § 5532. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ___.

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances. 10 U.S.C. § 2774. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

D. EFFECT OF EMPLOYEE'S FAULT

Constructive notice--receipt of documents

Failure to deduct premiums

Life insurance premiums (5-40)

Employee elected regular and optional life insurance coverage under the Federal Employee's Group Life Insurance Program (FEGLI), but when he transferred in 1969, the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. § 5584. Frederick D. Crawford, 62 Comp. Gen. 608 (1983).

Employee not on notice of error (5-42)

As a result of administrative error, two Customs Service employees received premium pay for holiday work in addition to the overtime compensation to which they were entitled. Waiver of overpayments is proper even though agency's pay policies may be a matter of common knowledge because standards to be applied in making waiver determination require consideration of particular facts surrounding overpayment. There is no evidence that leave and earnings statements showed additional payments of holiday pay, and, therefore, it cannot be said that receipt of those documents constituted constructive notice of error. Additionally, a great deal of confusion existed in the payroll office servicing the employees involved, making it even more difficult to determine correctness of pay. Ronnie C. Sutton and John W. McKenzie, B-206385, December 6, 1982.

CHAPTER 6

RESTRICTIONS ON PAYMENT OF COMPENSATION BY THE UNITED STATES AND ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

SUBCHAPTER I--RESTRICTIONS ON PAYMENT OF COMPENSATION BY THE UNITED SATES

A. MISCELLANEOUS STATUTORY PROVISIONS

Holding two positions (6-1)

When an employee holding one position is appointed to another position in violation of dual compensation laws, a rebuttable presumption arises that the employee intended to give up his first position. The agency must determine from which position the erroneous payments arose. In any event, the indebtedness is owed to the United States, the collection of which is subject to waiver under 5 U.S.C. § 5584 (1976) and 4 C.F.R. Parts 91 and 92 (1982). Fort Benjamin Harrison, B-208336, April 22, 1983.

Extra Compensation

Prohibition (6-2)

Members of the Advisory Committee on Reactor Safeguards, Nuclear Regulatory Commission, a Committee established by the Atomic Energy Act, are appointed pursuant to said statute. The Nuclear Regulatory Commission is therefore without authority to enter into employment contracts with Committee members granting them monetary benefits beyond those provided by existing law and regulations. Advisory Committee on Reactor Safeguards, B-207515, October 5, 1982.

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours. Sergeant Richard P. Stevenson, USAF, B-207034, November 4, 1982.

B. LIMITATION ON DUAL COMPENSATION FROM MORE THAN ONE CIVILIAN OFFICE

Computation of 40-hour period (6-6)

Individual, who was working for non-appropriated fund activity, accepted a temporary full-time appointment in appropriated fund position and worked two jobs in excess of 40 hours per week. Employee has violated Dual Compensation Act, 5 U.S.C. § 5533(a), by working more than 40 hours per week in two "positions" as defined under section 5531(2). The test is not whether the positions are paid from appropriated funds, but whether the employee worked in "positions" as defined by the statute which expressly includes positions in a nonappropriated fund instrumentality of the armed forces. Fort Benjamin Harrison, B-208336, April 22, 1983.

E. STATUTORY CEILINGS OF COMPENSATION

Judicial branch positions (6-15)

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges I, 62 Comp. Gen. 54 (1982).

Question presented is entitlement of Federal judges to 4 percent comparability increase under section 129 of Public Law 97-377, December 21, 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of section 129(b) of Public Law 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges. Federal Judges II, 62 Comp. Gen. 358 (1983).

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in October 1982. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically

authorized by Congress. Since section 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization. Federal Judges III, B-200923, December 28, 1983, 63 Comp. Gen. _____.

Limitation on pay fixed by administrative action (6-15)

Bureau of Engraving and Printing craft employees whose pay is set administratively under 5 U.S.C. § 5349(a), "consistent with the public interest," were properly limited to a 4 percent wage increase for fiscal year 1983. Although the pay increase limitation in the 1983 Appropriation Act did not apply to these Bureau employees, agency officials properly exercised their discretion by limiting pay increases consistent with the public interest in accordance with guidance issued by the Office of Personnel Management. Bureau of Engraving and Printing, B-211956, October 21, 1983.

Limitation on military retired pay (New)

Dual Compensation restrictions under 5 U.S.C. § 5532

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government, 5 U.S.C. § 5532. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances,

10 U.S.C. § 2724. Lieutenant Colonel Robert E. Frazier, USA (Retired), B-212226, December 16, 1983, 63 Comp. Gen. ____.

Dual Compensation restrictions under 5 U.S.C. § 5532 note (1982) (New)

The deduction from civilian pay in the amount of increases in retired pay of a "member or former member of a uniformed service" as required by subsection 301(d) of the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253, September 8, 1982, 96 Stat. 763, 791, as amended by Public Law 97-346, October 15, 1982, 96 Stat. 1647, 1648, 5 U.S.C. § 5532 note (1982) is applicable to an individual who is a retired officer of an Army Reserve component. James F. Tierney, B-213231, December 16, 1983.

Limitation on Senior Executive Service Awards (New)

Performance awards

See Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____, digested above at Chapter 1, C.

Meritorious and Distinguished Executive Awards (New)

See Senior Executive Service, B-212756, September 27, 1983, 62 Comp. Gen. ____, digested above at Chapter 1, C.

SUBCHAPTER II--RESTRICTIONS ON ACCEPTANCE OF COMPENSATION FROM SOURCES OTHER THAN FEDERAL FUNDS

B. EMOLUMENTS FROM FOREIGN GOVERNMENTS (6-17)

Corporations (New)

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Article I, section 9, clause 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government. Lieutenant Colonel Marvin E. Shaffer, USAF, Retired, 62 Comp. Gen. 432 (1983).

CHAPTER 7

EMPLOYEE MAKE-WHOLE REMEDIES

B. BACK PAY ACT

Determinations regarding unjustified or unwarranted personnel actions

Reductions in force

Causal relationship to loss of pay (7-10)

Employee, whose temporary position expired, charges improper break in service caused her to lose the benefit of the highest previous rate rule when she was later reemployed at only step 1 of her prior grade. Our Office has no jurisdiction to consider her allegations that she was improperly denied appointment to another position or that her reemployment rights were violated. Such matters may be appealed to her employing agency or the Merit Systems Protection Board. Irene Sengstack, B-212085, December 6, 1983, 63 Comp. Gen. ____.

Nondiscretionary agency policy

Stated agency policy (7-14)

Agency asserts that its internal regulations which establish a policy to make temporary promotions for details mandatory after 30 days, was based on our early Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) sustained at 56 Comp. Gen. 427 (1977). Therefore, agency argues that after Turner-Caldwell III, 61 Comp. Gen. 408 (1982), which overruled prior Turner-Caldwell decisions, the agency's policy changed and its regulations did not require such temporary promotions. However, a reading of the applicable agency regulations show that no changes were made, and, therefore, we conclude on the basis of the agency's regulations that a nondiscretionary policy to grant temporary promotions for employees detailed to a higher-graded position for more than 30 days existed. Accordingly, the employee may be granted a retroactive temporary promotion beginning the 31st day of the detail. Howard A. Morrison, B-210917, August 10, 1983.

Federal Aviation Administration (FAA) questions overtime entitlement of certain air traffic controllers who were fired

but later restored retroactively. Although FAA contends there was no nondiscretionary policy governing the assignment of overtime, our decisions concerning overtime pay in backpay awards do not require such a policy. The overtime the controller normally would have worked during the period of separation should be determined by the FAA based upon prior overtime payments or upon overtime paid to similar employees who were not removed, and must be included in the backpay award. Ronald J. Ranieri, B-207977.2, August 23, 1983.

Retroactive change in initial appointments (7-18)

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with backpay under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded. Ladorn Creighton, 62 Comp. Gen. 343 (1983).

Premium pay

Overtime (7-21)

Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied. Kenneth L. Clark, 62 Comp. Gen. 370 (1983).

Awards (7-22)

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back-pay under 42 U.S.C. §2000-16(b) (1976 & Supp. III 1979). Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1) (1982), backpay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as

amended, 5 U.S.C. § 5596 (1976 & Supp. IV 1980), and its implementing regulations set forth in 5 C.F.R. § 550.805 (1982). The standards for computing backpay must be applied in light of the make-whole purposes of 42 U.S.C. § 2000e-16(b). Ladorn Creighton, 62 Comp. Gen. 343 (1983).

C. REMEDIES NOT ALLOWED UNDER THE BACK PAY ACT

Attorney fees and other litigation expenses (7-23)

Editor's Note: As noted in the main volume at 7-23, Title VII of the Civil Service Reform Act of 1978 amended the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii) (Supp. III 1979) effective January 11, 1980, to allow payment of reasonable attorney fees where an employee is found to have been affected by an unjustified or unwarranted personnel action. Additionally, as the text of the following cases demonstrate, 5 C.F.R. § 550.806(c) and Allen v. U.S. Postal Service, 2 MSPB 582 (1980) must be consulted to determine whether payment is "in the interest of justice."

Disability Retirement (New)

Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. David G. Reyes, B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended, is allowed since GAO, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. § 550.806. Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality. Shelby W. Hollin, 62 Comp. Gen. 464 (1983).

Employee, who was reemployed by Bureau of Alcohol, Tobacco and Firearms following service with Federal Energy Agency, did not receive benefit of highest previous rate rule. Following successful claim with GAO for retroactive pay adjustment, the union representing the employee claims attorney fees under the Back Pay Act, 5 U.S.C. § 5596, as amended. The claim for attorney fees is denied since payment is not deemed in the interest of justice under the circumstances. We conclude that the agency did not commit a prohibited personnel practice and that the agency neither knew nor should have known it would not prevail on the merits, two

criteria for awarding attorney fees in the interest of justice. Elias S. Frey, B-208911, June 10, 1983.

D. COMPUTATION OF BACKPAY UNDER 5 U.S.C. § 5596 (7-26)

Effect of Barring Act (New)

An intermittent Federal employee failed to receive within-grade increases due to administrative error. Upon discovery, the employing agency took corrective action under 5 U.S.C. § 5596, but submitted the back pay award claim here because the period covered spanned 19 years. Portion of claim arising before July 7, 1976, is barred since 31 U.S.C. § 71a (now 31 U.S.C. § 3702(b)(1)) limits recovery to 6-year period prior to receipt of claim here, and this Office does not have the authority to waive or modify its application. The accrual of a claim for underpayment of compensation found due pursuant to employing agency determination for services rendered is the date of performance and a new claim accrues on each day such services are rendered. 29 Comp. Gen. 517 (1950). Alfred L. Lillie, B-209955, May 31, 1983.

Alternate Employment (New)

Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was redy, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leve. Kenneth J. Clark, 62 Comp. Gen. 370 (1983).

Gradual Retirement Plan (New)

A regularly scheduled full-time employee participated on one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum

schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 (1977) and B-206655, May 25, 1982, distinguished. Richard A. Wiseman, B-210493, August 15, 1983.

Setoff of outside earnings from backpay

Unemployment compensation (7-28)

The Commissioner of Customs asks whether unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. § 5596. Under the law providing Unemployment Compensation for Federal Employees (5 U.S.C. §§ 8501, et seq.) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable State's law. Since unemployment compensation received from a State by a Federal employee during a period of wrongful separation may be required to be refunded to the State, no deduction should be made from the backpay award. Glen Gurwit, B-208097, December 7, 1983, 63 Comp. Gen. ____. See also Ralph V. McDermott, B-125137, December 7, 1983.

Editor's Note: The above cases are an accurate statement of the law in this area as of December 1983. At present, the Office of Personnel Management and the Department of Labor are considering possible ways to change the law so that unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation could be deducted from a subsequent backpay award under 5 U.S.C. § 5596.

E. OTHER MAKE-WHOLE REMEDIES

Employment discrimination (7-30)

Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. § 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not permitted under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Employee filed discrimination complaint when he was not selected for a promotion. Informal settlement of complaint without any admission of discrimination contained lump-sum monetary award to employee. Since the award is related to backpay and is less than the maximum amount recoverable if discrimination had been found, the settlement may be implemented. Only taxes and other mandatory deductions are required to be withheld from this award. Daniel L. Fisher, B-212723, September 20, 1983.

An applicant was not selected for a teaching position at West Point Elementary School and filed a discrimination complaint with the Equal Employment Opportunity Commission. The Commission ordered the Army to offer her employment with backpay and if she declined employment the pay she would have received from September of 1979 until the date the offer was made. The applicant is entitled to the full amount of her claim because, according to the applicable regulations she was available for the position during the entire period even though she accompanied her husband, a military officer, on a tour of duty in Korea for part of the period. Mrs. Lujuana Butts, B-211522, October 12, 1983, 63 Comp. Gen. ____.

GAO jurisdiction (7-30)

In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, GAO does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision. Equal Employment Opportunity Commission, 62 Comp. Gen. 239 (1983).

Interest on backpay awards for discrimination (7-30)

There is no authority to allow interest on backpay provided for in a Conciliation Agreement entered in the settlement of a law suit which alleged discriminatory conduct by Government officials. It is a well-settled rule of law that interest may be assessed against the Government only under express statutory authority; and neither the Equal Employment Opportunity Act, the incorporated provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., nor any other act provides express authorization of interest against the Government in this situation. Juan S. Griego, B-207176, January 6, 1983.

CHAPTER 8

OTHER PROVISIONS PERTAINING TO EMPLOYEES

E. SETTLEMENT OF ACCOUNTS OF DECEASED OFFICERS AND EMPLOYEES

Surviving spouse as designated beneficiary (8-22)

Annulment of marriage (New)

Annuity payments to the widow of a deceased member under the Retired Serviceman's Family Protection Plan which were terminated at the time of the widow's subsequent marriage in Nevada in October 1963, may be paid for the period retroactive to September 1977 when payments to the contingent beneficiaries were discontinued since a Nevada court entered a decree of annulment in December 1963, as a result of her allegations of fraud. Under Nevada law the marriage became void ab initio when the decree of annulment was entered. Alice S. Burden, B-210542, August 23, 1983.

In determining the effect of a December 27, 1963 annulment of a marriage we will follow the decision in Thurber v. United States (W.D. Wash., N.D. October 28, 1963) which held that under Nevada law an annulment of a marriage by a court of competent jurisdiction on the grounds of fraud entitled the plaintiff therein to reinstatement of an annuity under the Retired Serviceman's Family Protection Plan. Alice S. Burden, B-210542, August 23, 1983.

F. PAYMENTS TO MISSING EMPLOYEES (8-26)

Retired Pay (New)

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551-557 which permits continued payments until the member is presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death. Major James H. Ackley, USAF, Retired, 62 Comp. Gen. 211 (1983).

A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the members's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death. Major James H. Ackley, USAF, Retired, 62 Comp. Gen. 211 (1983).

H. LABOR RELATIONS MATTERS

GAO jurisdiction pursuant to 4 C.F.R. Part 22 (8-29)

Agency objects to GAO jurisdiction (8-30)

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to GAO and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter. American Federation of Government Employees, Local 2459, 62 Comp. Gen. 274 (1983).

GAO will not take jurisdiction of a union request filed under 4 C.F.R. Part 22 when the agency objects to the submission, even though the objection was not submitted within 20 days after receipt of the union request. GAO will exercise its discretion to consider comments received after the 20-day time period has expired, and in light of the agency's objection, will not assert jurisdiction in this matter because to do so would disrupt labor-management procedures authorized by 5 U.S.C. §§ 7101-7135. Customs Service Employees, B-209754, April 20, 1983.

Nondiscretionary agency policy (New)

Stated agency policy

See Howard A. Morrison, B-210917, August 10, 1983, digested above at Chapter 7, B.

Retroactive wage increases (New)

The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis. Panama Canal Employment System, 62 Comp. Gen. 605 (1983).

J. SERVICES TO EMPLOYEES (8-32)

An employee, who was required to undergo a fitness-for-duty examination and who, prior to the examination, underwent medical tests in the course of diagnosis and treatment, may not be reimbursed for the cost of these tests even though they were relied upon by the physician administering the fitness-for-duty examination. Costs of treatment are personal to the employee. Use of the tests by the physician performing the fitness-for-duty examination as part of the medical history furnished by the employee did not result in any cost to the employee beyond that already incurred for treatment. Chester A. Lanehart, B-212562, December 6, 1983, 63 Comp. Gen. ____, but see Irene Kratochvil, B-213431, February 28, 1984.

CHAPTER 9

SERVICE AS JUROR OR WITNESS

INTRODUCTION

A. STATUTORY PROVISIONS

Setoff of fees for jury or witness service in state courts (9-1)

A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours. Sergeant Richard P. Stevenson, USAF, 62 Comp. Gen. 39 (1982).

SUBCHAPTER I--SERVICE AS JUROR

B. PAYMENT FOR JURY SERVICE

Jury service overlapping normal workhours (9-3)

When an employee, while serving on jury duty 8 hours a day, also performs 4 hours of his regular duties, he is not entitled to premium pay for overtime for performing his regular duties. Jury service may not be regarded as work actually performed in excess of 8 hours for which overtime compensation is payable. Internal Revenue Service Employee, B-210181, March 8, 1983.

SUBCHAPTER II--COURT LEAVE

A. ENTITLEMENT (9-7)

Overtime Compensation (New)

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay. Overtime Compensation for Firefighters, 62 Comp. Gen. 216 (1983).

CHAPTER 10

SERVICES OBTAINED THROUGH OTHER THAN REGULAR EMPLOYMENT

SUBCHAPTER I--EXPERTS AND CONSULTANTS

E. RIGHT TO COMPENSATION (10-11)

Severance Pay (New)

Claim of Bolivian national for additional severance pay under personal services contract with Agency for International Development Mission to Bolivia may be settled by the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601, et seq. (Supp. III, 1979). Enrique Garcia, B-206352, October 1, 1982.

SUBCHAPTER II--CONTRACT SUPPORT AND TECHNICAL SERVICES

A. DETERMINATION TO CONTRACT OUT (10-15)

The 1979 revision of OMB Circular No. A-76 referred to in the main volume has been further revised. For the current version, see OMB Circular No. A-76 (Revised), Performance of Commercial Activities, issued August 4, 1983. See also the detailed Supplement to the foregoing revision issued by OMB in August 1983.

Editor's Note: It may also be necessary to consult Addendum No. 1 to the foregoing Supplement issued by OMB on September 14, 1983. This Addendum reproduces the section on "Tax Exempt Organizations" which was inadvertently omitted from Chapter 3, Part IV of some printed versions of the Supplement.

CHAPTER 11

PREVAILING RATE SYSTEMS

SUBCHAPTER II--BASIC COMPENSATION

F. CONVERSION AND TRANSFER BETWEEN PAY SYSTEMS AND GRADE AND PAY RETENTION (11-8)

Cost-of-living allowance (New)

Department of Transportation questions payment of full cost-of-living allowance (COLA) to Coast Guard employee in Alaska whose position was converted from the prevailing rate system to the General Schedule. Employee retained his WS-6 grade for 2 years and is now on retained pay in excess of GS-11, step 10, under 5 U.S.C. §§ 5362 and 5363 (Supp. III 1979). Employee is entitled to full 25 percent COLA for the area under 5 U.S.C. § 5941 (1976), based on the rate of basic pay for GS-11, step 10, not on his retained rate of pay. U.S. Coast Guard, B-206028, December 14, 1982.

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CHAPTER 2

ANNUAL LEAVE

D. TRANSFERS AND REEMPLOYMENT

Remployment

After military service (2-11)

An employee who retired after 20 years of military service and was employed in a Federal civilian agency in 1976 is not entitled to a recredit of the leave he alleges was available at the time he left his former civilian employment and entered military service in 1955. In the absence of official records or corroborating evidence, the employee's estimate alone is insufficient to certify a prior leave balance upon reemployment in a civilian position. John H. Adams, B-209769, March 28, 1983.

E. ADMINISTRATION OF ANNUAL LEAVE

Traveltime

Other traveltime

Administrative Discretion (2-20)--See also Francis A. Brennan, B-210686, October 19, 1983.

F. RESTORATION OF LEAVE

Under Public Law 93-181

Generally

Forfeiture because of additional holidays (2-24)--An employee on approved leave for the remainder of the 1981 leave year forfeited 4 hours of annual leave as a result of the President granting 4 hours of administrative leave on December 24, 1981. The failure of the employee's agency to counsel him of GAO's holding in Joseph A. Seymour, B-182549, August 22, 1975, that there is no authority to restore leave forfeited in this type of situation, does not constitute administrative error since the agency did not have a regulation requiring that its employees be counseled concerning

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possible forfeiture. William M. Gaultieri, B-207139, September 29, 1982.

Administrative error

What does not constitute administrative error --

Leave forfeited in connection with "buy back" (2-31)

An employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from a work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave records to show recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were found to be subject to forfeiture. Regular annual leave reinstated as the result of buy back and subject to forfeiture under 5 U.S.C. § 6304(a) (Supp. III 1979), may not be restored under 5 U.S.C. § 6304(d) nor may restored leave recredited to a prior leave year and subject to forfeiture under 5 C.F.R. § 630.306 (1982) be restored further. However, since the employing agency failed to apprise the employee of the consequences of buy back, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all forfeiture. The employee would then be entitled to be paid for the 66 hours of leave at the pay rates then in effect and he would have to refund the portion of workers' compensation covered by that leave. Edmond Godfrey, B-205709, March 16, 1983 (62 Comp. Gen. 253).

Exigencies of public business

What does not constitute an exigency of public business (2-32)--For same principle as B-197957, July 24, 1980 see Terry A. Nelson, B-209958, March 2, 1983.

Under Back Pay Act of 1966

Involuntary leave

Disability retirement (2-36)--For same principle as B-128314, January 8, 1979, but involving regular retirement rather than disability retirement, see Ralph C. Harbin, B-201633, April 15, 1983.

CHAPTER 3

LUMP-SUM LEAVE PAYMENTS

B. ENTITLEMENT (3-2)

Payable upon garnishment (New)

Where the wife of a former employee seeks to garnish for child support money due the employee for accrued annual leave and the former employee's whereabouts and/or continued existence is unknown, payment may be made without determination of the status of the employee since in this case, under 5 U.S.C. 5582, the wife would also receive any money due the employee if he is deceased. However, payment must be in accordance with the limitations contained in section 303(b) of the Consumer Protection Act, 15 U.S.C. 1673(b), since under Office of Personnel Management Regulations, those limitations also apply to garnishment of payments in consideration of accrued leave. Wesley E. Pitts, B-207015, December 14, 1982.

D. REEMPLOYMENT AND RECREDIT

Refund

Refund required

Not subject to waiver (3-13)--Following a 1-workday break in service, a former employee of the Panama Canal Company, who received a lump-sum payment from the Company for his accrued leave, was reemployed by the Department of the Navy. He is required by statute to refund the amount of the lump-sum leave payment he received except the amount covering his one day break in service since he was employed in Government service during the period covered by the lump-sum payment. The Government's claim may not be waived since, even if it is considered as an erroneous payment, the employee was not without fault in the matter. Darell K. Seymour, B-201211, April 11, 1983.

CHAPTER 4

SICK LEAVE

B. TRANSFERS AND REEMPLOYMENT

Reemployment after break in service

Generally

Appointment after 3 years (4-4)--An employee who had a break in Federal service of more than 3 years may not receive a recredit of sick leave on the basis that he was prevented from earlier reinstatement by the imposition of a Federal hiring freeze, and by the agency's delay in completing his required background investigation. The employee's unused sick leave may not be recredited since under 5 C.F.R. § 630.502(b)(1), recrediting of sick leave is permitted only when an employee's break in service does not exceed 3 years. Neither this Office nor the agency concerned may waive or grant exceptions to that regulation, which has the force and effect of law. Recredit of Sick Leave of FBI Employee After Break in Service, B-209068, January 20, 1983.

C. ADMINISTRATION OF SICK LEAVE

Granting

Agency discretion (4-9)

It was within the discretion of the appropriate officials of the Defense Investigative Service to decide that one of its employees who requested sick leave was entitled to it, based on evidence that the employee was absent due to a severe physically incapacitating emotional injury following the death of his wife. Michael J. DeLeo, B-207444, October 20, 1982.

Changing of separation date for purpose of granting sick leave

Generally (4-14)

The movement of a former employee's resignation date 6 months forward to the date of his death in order to permit payment of accumulated sick leave, life insurance benefits,

and a survivor's retirement annuity to his widow, may not be allowed. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error or violation of policy or regulation which would warrant a change in the employee's separation date. Although the widow states that her husband would not have intended to resign had he known of his illness, that does not establish contrary intent sufficient to change his separation date. Although the widow also suggests that the illness reduced her husband's capacity to make a responsible decision regarding his resignation, in the absence of a judicial ajudication of incapacity, we must presume that the employee had the legal mental capacity to discharge his rights and obligations. Kenneth A. Gordon, B-210645, August 12, 1983 (62 Comp. Gen. 620).

CHAPTER 5

OTHER LEAVE PROVISIONS

A. ADMINISTRATIVE LEAVE

Medical purposes

Work-related injury (5-4)

An employee who sustained a work-related injury was placed on administrative leave by the agency for a period of almost 4 months. The agency had no authority for granting the employee administrative leave for such an extended absence resulting from an injury. Accordingly, the agency should rescind the administrative leave and charge sick and annual leave for the period in question. Since the employee's leave balances were sufficient to cover only a portion of his 4-month absence from work, the agency should retroactively place him on leave without pay for the remainder of that period. Walter R. Boehmer, Jr., B-207672, September 28, 1983.

Other specific situations (5-5)

Partial shutdown of agency (New)

In its discretion, the Merit Systems Protection Board (MSPB) may retroactively grant administrative leave with pay to employees who were ordered not to report for work during a brief partial shutdown of the agency implemented in order to forestall a funding gap which would have necessitated a full closedown. The MSPB may grant such leave to the extent appropriated funds were available and adequate on the dates of the partial shutdown. Merit Systems Protection Board, B-208406, October 6, 1982 (62 Comp. Gen. 1).

Sale of a horse (New)

An employee who was transferred from Texas to Puerto Rico incident to a reduction-in-force began travel less than 30 days after travel orders were issued. The employee was granted administrative leave to sell a horse and equipment he used in official Government business which, due to the short time involved, had to be sold with professional help

at a distant location. The grant of administrative leave is a matter of agency discretion under the guidance of our decisions. We have no objection to the grant of administrative leave in the circumstances presented. Richard D. Knight, B-212688, December 16, 1983.

Union activities (5-8)

Prior to the effective date of the Civil Service Reform Act of 1978, two employees attended a meeting in their capacity as union representatives and their agency refused to grant administrative leave for the trip. At the time of their travel it was within the discretion of the agency to grant administrative leave to employees while representing employee organizations, and, in the absence of evidence that the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, we will not disturb the agency's determination. George J. Keenan and Gerald S. Goodman, B-209285, March 22, 1983.

Pending voluntary retirement (5-9)

See also Gladys W. Sutton, B-209652, August 12, 1983.

C. COURT LEAVE (5-12)

Unsuccessful plaintiff in action against Federal Government (New)

An employee who brought an action in United States District Court against the Department of Labor (DOL), seeking to prevent her removal from her position by the Secretary of Labor, was charged 4 hours of annual leave for time spent observing oral argument in her case. The District Court ruled she was improperly separated but the United States Court of Appeals upheld her separation. DOL did not abuse its discretion in charging her annual leave since there is no basis for an unsuccessful plaintiff suing the Federal Government to have such time considered official time. Furthermore, 5 U.S.C. § 6322 granting court leave to jurors or witnesses does not apply here. Ismene M. Kalaris, B-212031, September 27, 1983.

Service as witness (5-17)

Employee-defendant as witness (New)

An employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant. Entitlement of Employee-Defendant to Court Leave, B-208185, December 14, 1982 (62 Comp. Gen. 87).

D. MILITARY LEAVE

Entitlement (5-19)

Key Federal employees - members of standby reserve (New)

Special Agents of the FBI who have been designated Key Federal Employees and are members of the Standby Reserve are entitled to military leave under 5 U.S.C. § 6323(a) when they are on active duty for training. The employees may not use or be charged annual leave for such duty unless the period of active duty for training exceeds the military leave available to the employee. Federal Bureau of Investigation - Active Standby Reserve Elective Training, B-208706, August 31, 1983.

Administration of military leave

Under section 6323(a)

Nonwork days (5-22)--See also George McMillan, B-211249, September 20, 1983.

Partday (5-23)--See also George McMillan, B-211249, September 20, 1983.

Use of annual leave (5-25)--Under normal circumstances, an employee may not elect to use annual leave rather than military leave for days he is absent from his civilian employment while performing active military duty under orders at his own option. However, the employee may be involuntarily assessed annual leave, or leave without pay if appropriate, for the days he is absent from civilian employment to perform active duty for training after his military leave has been exhausted. In that situation the

employing agency should ordinarily charge the first 15 days of active duty to military leave, and then charge the days of absence from employment for the performance of additional active duty to annual leave or leave without pay. George McMillan, B-211249, September 20, 1983.

E. HOME LEAVE

Entitlement (5-27)

Generally (New)

An employee of the Department of Agriculture was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico and was thus eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. § 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred.

Since she qualified for the maximum annual leave accumulation of 45 days under 5 U.S.C. § 6304(b)(1), and completed a basic period of 24 months continuous service abroad she was entitled to accrue home leave under 5 U.S.C. § 6305(a) on the basis of her continuous service. Although the rate at which she earned home leave was subject to the agency's interpretation of implementing regulations at 5 C.F.R. § 630.604, the agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted.

The agency's policy which purports to deny the 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in the continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements. Estelle C. Maldonado, B-208908, July 13, 1983 (62 Comp. Gen. ___).

Administrative discretion (5-28)

The determination as to when and in what amount home leave will be granted is a matter for administrative determination. Estelle C. Maldonado, B-208908, July 13, 1983 (62 Comp. Gen. ___).

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CHAPTER 2

APPLICABILITY AND GENERAL RULES

SUBCHAPTER I-APPLICABILITY

B. Specific classes of persons covered (2-1)

Employees engaged in collective bargaining (New)

The United States Supreme Court has found that employees representing their union in collective bargaining with their agency are not entitled to the payment of travel expenses and per diem allowances under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Bureau of Alcohol, Tobacco and Firearms, Petitioner v. Federal Labor Relations Authority et al., 44 CCH S. Ct. Bull. B281 (No. 82-799 Nov. 29, 1983). See also, George J. Keenan and Gerald S. Goodman, B-209285, March 22, 1983.

Appointee's travel to first duty station

Manpower shortage positions

Authorization of travel expenses --

Authorization after travel is completed (2-14)

A temporary employee was offered and accepted a permanent position with the U.S. Forest Service in Alaska while serving in California. The appointment was deferred due to a hiring freeze. He was then offered a temporary position in Alaska pending the lifting of the freeze. He resigned his position, had a break in service of 11 days, and traveled at his own expense to accept the temporary appointment. After the hiring freeze was lifted, the employee was again offered a permanent appointment. He accepted, and his temporary appointment was converted to a permanent one. Because of the break in service, he could be reimbursed travel and transportation expenses as a new appointee in traveling to accept a temporary position at a post of duty outside the continental U.S. under 5 U.S.C. § 5722, even though a travel authorization had not been issued. Robert E. Demmert, B-207030, September 21, 1983.

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Reemployment after separation (2-15)

An employee who was separated by a RIF was not entitled to travel expenses incurred when she traveled at a later date back to that location to accept a temporary appointment. There was no statutory authority for payment, since 5 U.S.C. § 5724a(c) requires that the employee must be reemployed in a nontemporary position, and in a different geographical location, in order to be reimbursed. Jan Evans, B-209026, February 9, 1983.

Intergovernmental Personnel Act

Federal Government employees

Per diem versus station allowances -- (2-16) Agencies should recognize that ordinarily for assignments of 2 years, per diem would be inappropriate. William T. Burke, 207447, June 30, 1983.

SUBCHAPTER II - GENERAL RULES AND DEFINITIONS

D. Official duty station

Determination question of fact (2-30)

An employee of the U.S. Forest Service grieved his entitlement to per diem in connection with his assignment to a seasonal worksite every 6 months. We agreed with the Grievance Examiner's factual determination that the employee was in a TDY status and therefore was entitled to per diem as provided for in the U.S. Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employee maintained his permanent home at his official duty station while living in Government quarters at the seasonal worksite. Frederick C. Welch, B-206105, December 8, 1982.

The assignment of a U.S. Customs Service employee to a new duty station for 2 years under a rotational staffing program was held to be a PCS rather than TDY. We have held that the duration of an assignment and the nature of the assigned duties are the vital elements in the determination of whether an assignment is TDY or a PCS. Although the assignment here was for a definite time period and further reassignment of the employee was contemplated, the duration of the assignment was far in excess of that normally contemplated as temporary. Moreover, the duties assigned were not those usually associated with TDY. Peter J. Dispenzirie, 62 Comp. Gen. 560 (1983).

CHAPTER 3

PURPOSE FOR WHICH TRAVEL MAY BE AUTHORIZED

H. Temporary duty

Unscheduled return to official station on workdays

Illness in family (3-8)

No substantial completion of assignment (New)

The return travel expenses of an employee who abandoned a TDY assignment for personal reasons--his wife's illness--could not be paid, since it was administratively determined that he did not substantially complete the assignment. The assignment was to evaluate a 2-week training course, and the employee returned home at the end of the first week. Since the administrative determination was not shown to be improper or unjustifiable, we would not disturb it. Eugene S. Sheskin, B-211692, June 9, 1983.

Effect of early arrival on entitlement (New) (3-9)

An employee claimed reimbursement for lodging expenses incurred on the evening prior to the day he began TDY. He is entitled to reimbursement, even though he did not perform official duty on that day. He had been issued a General Travel Authorization permitting him to travel without specific prior authorization. He took annual leave on Friday for personal travel and traveled to his TDY site on Sunday, rather than returning to his official duty station and proceeding to his TDY site on Monday. Since he began work Monday morning, the lodgings expenses on Sunday were incident to official duty under the circumstances of the travel. Walter Wait, B-208727, January 20, 1983.

L. Fitness for duty examination (New) (3-21)

An employee who is required to undergo a fitness-for-duty examination as a condition of continued employment may choose to be examined either by a U.S. medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed. Travel Expenses Arising from Employee's Fitness for Duty Examination, B-208855, April 5, 1983.

CHAPTER 4

TRANSPORTATION

SUBCHAPTER I-TRANSPORTATION ALLOWABLE

A. Authorized modes of travel

Use of U.S. air carriers--the Fly America Act

Scheduling and routing travel

Indirect travel--(4-6) En route home from TDY overseas, an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the U.S. on a U.S. air carrier. Upon arrival in Shannon, the employee was informed that his scheduled flight had been discontinued, and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers for the transoceanic portion of his travel, no penalty was necessary for the use of a foreign air carrier. Fly America Act Penalty for Involuntary Re-routing, 62 Comp. Gen. 496 (1983).

Considerations not justifying use of foreign air carrier service

Misunderstanding of the law--(4-8) Employees whose international travel was routed by a transportation official of the agency on non-certificated carriers in violation of the Fly America Act were liable for the expenses incurred by such travel, even though agency regulations required transportation officers to make travel arrangements. Transportation expenses incurred in violation of the Fly America Act may not be paid from appropriated funds, and transportation officers acting in their official capacity are not subject to the imposition of liability for errors of judgment. General William Coleman USAF, et al., B-206723, October 21, 1982.

Considerations justifying use of foreign air carrier service

Generally--(4-10) Under guidelines issued by the Comptroller General, reasons for the use of foreign air carrier must be properly certified. Comptroller General decisions contain guidelines regarding the adequacy of

reasons for utilizing a foreign carrier. The Joint Travel Regulations require a determination of unavailibility by the transportation or other appropriate officer, and the requirements contained therein are in keeping with the Comptroller General's guidelines, and reimbursement is not authorized absent compliance with them. John King, Jr., 62 Comp. Gen. 278 (1983).

Diplomatic Considerations (New) (4-10)

An employee assessed a Fly America Act penalty for foreign air carrier travel to and from China as a member of a delegation offered the explanation that foreign air carrier travel enabled the delegation to arrive as a group, and that individual arrivals would have interfered with diplomatic process. If his agency determined that diplomatic considerations would warrant finding that the use of a U.S. air carrier would not accomplish the agency's mission, his liability could be excused on the basis that travel by a foreign air carrier was a matter of official necessity. Daniel Bienstock, B-205206, April 15, 1983.

Military Airlift Command service available (New) (4-10)

An employee of the Navy en route from TDY overseas selected a particular schedule for the purpose of taking leave along a usually traveled route. He used a foreign air carrier for one leg of his travel, even though he could have used MAC chartered air service for travel from his place of origin to the U.S. Since MAC full plane charter services need not be considered as available U.S. air carrier service under the Fly America Act, his use of a foreign air carrier could be justified in the usual manner using only available commercial flights. However, under his travel order and the applicable regulation, reimbursement for his return travel was limited to the constructive MAC cost. Nelson P. Fordham, 62 Comp. Gen. 512 (1983).

B. Other expenses incident to transportation

Insurance premiums

Liability for damages (4-19)

A Navy employee on TDY who was authorized commercial car rental declined the extra collision insurance necessary to provide full coverage, and became obligated to pay any loss through collison damage to a maximum of $500. While on a

trip outside the primary duty area, and going to a restaurant with a friend and his wife, he allowed the friend to drive the rental car, and the vehicle was damaged in an accident. The Navy determined that the automobile was being used on other than official business. That determination was not questioned, and reimbursement for the personal funds that the employee paid for the damages was not authorized. Timothy J. Doyle, B-209951, June 7, 1983.

Liability insurance (4-19)

A contracting officer of the Equal Employment Opportunity Commission authorized the rental of an automobile, including the payment of the collision damage waiver and personal accident insurance. The rental agency could not be paid for that part of the invoice pertaining to these insurance items, since FTR para. 1-3.2c(1) prohibits payment for collison damage insurance, and the same rule applies to personal accident insurance. Avis Rent a Car-Insurance-Collision Damage Waiver, B-208630, March 22, 1983.

SUBCHAPTER III--RULES ASSOCIATED WITH USE OF COMMERCIAL TRANSPORTATION

B. Taxicabs

Between lodging and food facility (4-31)

An employee on TDY in Houston, Texas, claimed cab fares to obtain meals while in Miami, Florida, during a holiday weekend. Cab fares may not be paid under FTR para. 1-2.3b where, for reasons of personal preference and not due to the nature of the TDY assignment, the employee obtains meals in distant locations. Jeffrey Israel, B-209763, March 21, 1983.

C. Rental automobiles and special conveyances

Generally (4-31)

An official at DOE, who headed the U.S. delegation to an international conference, could be reimbursed for a tip to the driver of a car hired with driver by the American Embassy in Vienna, Austria, for his use during the conference. DOE has determined that the tip was appropriate and customary in these circumstances, and applicable regulations authorize reimbursement of local transportation expenses, including tips for official business when an employee is on a TDY assignment. W. Kenneth Davis, B-211227, September 28, 1983.

Authorized or approved (4-31)

An employee claimed reimbursement for costs incurred incident to his use of a rental car while attending a conference. The agency, contending that use of a rental car was not authorized as advantageous to the Government, determined that the employee should have used an alternative, less expensive mode of transportation. Accordingly, the employee's reimbursement for this item was reduced by the agency, the amount being calculated by comparison to expenses incurred by other agency travelers attending the same conference. Although the duly authorized official approved the employee's voucher, he did so without making a determination of advantage to the Government, and given the factors involved, no such determination could have been made. The method used by the agency to reduce the claimed reimbursement for this item was not arbitrary or capricious, and so was permissable. Robert P. Trent, B-211688, October 13, 1983. See FTR paras. 1-2.2b and 1-2.2c(1)(a).

SUBCHAPTER IV--REIMBURSEMENT FOR USE OF PRIVATELY-OWNED CONVEYANCES

A. Mileage payments

Generally (4-40)

The travel orders of a Navy civilian employee limited reimbursement for first duty station travel by POV to the constructive cost of commercial air travel. Both FTR para. 2-2.3a and 2 JTR para. C2151(3), however, state that use of a POV for such travel is advantageous to the Government. Where the applicable regulations prescribe payment, the claim must be allowed--regardless of the wording of the travel orders. Dominic D. D'Abate, B-210523, October 4, 1983, 63 Comp. Gen. _____(1983).

Discretionary authority or approval

Travel in the vicinity of TDY station (4-45)

A DOE employee claimed mileage at his TDY station in order to obtain meals. The FTR allows reimbursement of such travel only when the TDY assignment is such that suitable meals cannot be obtained. Based on information before us, we concurred with the agency determination to deny such expenses. Gene Daly, B-197386, June 15, 1983.

Distance measurements

Automobile and motorcycle

Deviations requiring explanation--(4-45)

Where an employee transferred from San Francisco to Minneapolis avoided automobile travel via the most usually traveled route on the advice of the American Automobile Association, he could be paid a mileage allowance for travel of an additional 513 miles distance by a more southerly, but still usually traveled route. He could not be paid additional mileage for a deviation from that usually traveled route. Timothy F. McCormack, B-208988, March 28, 1983.

D. Privately-owned conveyance in lieu of common carrier

Computation of constructive cost (4-52)

Two terminals serve same area (New)

Although his travel orders reflected a higher estimated cost based on common carrier transportation using a terminal at Melbourne, Florida, an employee who traveled by a POV to and from Patrick Air Force Base, Florida, as a matter of personal preference, was entitled to mileage reimbursement limited to a lower cost airfare based on travel by way of the airport at Orlando, Florida. Where two terminals serve the same origin or destination, the constructive cost reimbursement should be based on a routing by way of the terminal giving the Government the benefit of any lower transportation costs. Leland G. Jackson, B-207496, November 9, 1982.

Common carrier available (4-52)

Because of a medical condition affecting an employee's eardrums, he was unable to travel by air to a TDY station. Instead of traveling by train, he chose to travel by POV, with reimbursement limited to the constructive cost of travel by common carrier. Since travel by air was not available to the employee, the "appropriate" common carrier transportation under FTR para. 1-4.3 was rail transportation, and the constructive cost of rail, rather than air, transportation was thus applicable. Timothy W. Joseph, 62 Comp. Gen. 393 (1983).

E. Privately-owned conveyance in lieu of Government vehicle

Generally

Not committed to use a Government-owned automobile (4-56)

An employee, who was a member of an agency review team and authorized to perform TDY travel in a group by Government-owned van, received permission to travel by POV as an exercise of personal preference. Since the agency did approve his POV use, and since the regulations do not authorize proration of reimbursement where a Government vehicle is used anyway, the employee could be reimbursed mileage at the rate authorized by FTR para. 1-4.4c. Don L. Sapp, 62 Comp. Gen. 321 (1983).

CHAPTER 5

OTHER EXPENSES ALLOWABLE

A. Baggage

Handling charges

Government-owned property (5-1)

An employee claimed reimbursement for tips paid to airport porters for the handling of a box containing literature acquired at a conference. The agency reduced the amount allowed for reimbursement, contending that the amount claimed by the employee was unreasonable. We will not disturb an agency determination regarding reasonableness of an expense, absent a showing that the determination was arbitrary, capricious or clearly erroneous. Moreover, since no separate charge was made for the handling of the box, the amount allowed for reimbursement should be charged to the employee's actual subsistence allowance, rather than as a necessary business expense. Robert P. Trent, B-211688, October 13, 1983.

B. Communication services

Official purpose and personal business (5-2)

Telephone calls before and after days of conference (New)

An employee claimed reimbursement for the cost of local telephone calls charged to his hotel room. The agency had disallowed reimbursement for local calls dated for the day before and day after the dates on which the conference which he attended was in session, stating that there was no need for the employee to conduct official business on these days. The employee bears the burden of proving that the costs incurred were essential to the transacting of official business. Because the employee failed to prove that these telephone calls were necessary business expenses incident to his official travel, his claim was denied. Robert P. Trent, B-211688, October 13, 1983.

C. Miscellaneous travel expenses

Other expenses (5-10)

Pet care (New)

An employee of HUD sought reimbursement for the cost of boarding his pet in a kennel while he was on TDY. Kennel expenses could not be paid, since neither 5 U.S.C. § 5706, nor FTR Chapter 1, Part 9, authorize such an entitlement. Absent statutory or regulatory authorization, kennel costs may not be reimbursed. John A. Maxim, Jr., B-212032, July 6, 1983.

Locksmith fee (New)

An employee on official travel may not be reimbursed for a locksmith fee incurred because he locked himself out of his rental car. The FTR does not allow reimbursement, because the fee was not necessarily incurred in the transacting of official business. The fee is personal to the employee, and so is not payable by the Government. Robert Berman, B-210928, April 22, 1983.

CHAPTER 6

PER DIEM

A. General provisions

Payment of per diem discretionary (6-1)

Pursuant to 2 JTR para. C8101-3f, (currently 2 JTR para. C4552-3f), a Navy activity had authority and responsibility for issuing a directive establishing a special rate of per diem for TDY to Andros Island, Bahamas, based on a determination that commercial establishments which prepare and serve meals were unavailable. The determination of the availability of commercial establishments was a matter within the discretion of the appropriate officials of the Navy activity. Absent clear evidence that the Navy officials abused their discretion, GAO will not question the conclusion that commercial establishments were unavailable. Per Diem Allowances--Temporary Duty at Andros Island, Bahamas--Reconsideration, B-201588, March 8, 1983.

Per diem at headquarters

Extraordinary circumstances (6-3)

An employee who was selected to fill a vacant position with his duty station in Missoula, Montana, and with TDY to be performed in Kalispell, Montana, could be paid per diem for duty he performed at Kalispell from July 27, 1981, through August 3, 1982, pending a relocation of the District Office to Missoula, since the evidence indicates Kalispell was a TDY station. It was intended that the employee perform TDY at Kalispell for only a short period of time, but there were difficulties in locating suitable office space. Further, the employee had reason to expect that the assignment would terminate at an early date. Don L. Hawkins, B-210121, July 6, 1983.

C. Expenses not covered by per diem (6-13)

Leased personal property with option to buy (New)

Absent evidence that a claimant terminated a television lease agreement with an option to purchase at the end of a TDY assignment, he could not include the cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable. Lucius Grant, 62 Comp. Gen. 635 (1983).

D. Interruptions of per diem entitlement

Voluntary return travel

Generally (6-21)

A DOE employee claimed weekend return travel reimbursement based on the maximum per diem rate, rather than the lesser amounts allowed for the use of a travel trailer during the week at the TDY station. The agency's determination to look to the average amounts allowed in the week preceding the return travel was permissable. Gene Daly, B-197386, June 15, 1983.

An employee on an IPA assignment to a university in Fayetteville, Arkansas, claimed travel expenses for his return to Kansas City on nonworkdays. Although it was originally intended that he would relocate his residence and change his PDY station to Fayetteville, his travel orders were ambiguous as to whether TDY entitlements or PCS allowances, or both, were authorized. Since employees traveling on IPA assignments may receive per diem or PCS allowances, but not both, we did not object to the employee's election to be paid per diem at Fayetteville; and the travel expenses claimed, insofar as they do not exceed the per diem that would have been paid, if he had stayed in Fayetteville for the nonworkdays involved. Dr. William P. Hefly, B-208996, April 12, 1983.

E. Computation of per diem

Beginning and ending entitlement

"Thirty-minute rule" (6-27)

The 30-minute rule applicable to the payment of per diem under FTR para. 1-7.6e is not intended to be applicable to continuous travel of 24 hours or less. Lloyd G. Chynoweth, 62 Comp. Gen. 269 (1983).

F. Rates (6-31)

Lodging at employee's property held for rental (New)

An employee on an extended temporary assignment lodged in a camp which he owned and claimed to hold as rental property. For the entire period of his temporary assignment, he claimed per diem for lodging in an amount which he says is the minimum for which

he would have rented his camp to sportsmen on a daily basis. Payment of his claim could not be authorized in the absence of clear and convincing evidence that the lodging would have been rented during the entire period covered by his claim, and then only for the expenses occasioned by his temporary assignment. Rodney J. Gardner, B-210755, May 16, 1983.

An employee who used his mobile home for lodging while on TDY could not include a $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance, even though he claimed that the mobile home was held for rental purposes. If the employee submitted documentation to establish that the property was held and used as a rental unit and would otherwise have been rented out during the period of his claim, allocable interest and taxes incurred, if any, could be included in determining his lodging costs. Lucius Grant, Jr., 62 Comp. Gen. 635 (1983).

Rates fixed by agencies

Lodging-plus method

Lodging with monthly rate--(6-32) An employee rented a house for a month while on TDY, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period, but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis could be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determined the employee acted prudently in obtaining the lodgings for a month and the cost to the Government did not exceed the cost of suitable lodging at a daily rate. Jesus Soto, Jr., 62 Comp. Gen. 63 (1982).

Reduced per diem (6-33)

Travel trailers--(New) A DOE employee who used a travel trailer for TDY failed to justify his additional expenses after DOE amended its per diem for the use of travel trailers to $23 for meals and miscellaneous expenses and $15 for "incidental expenses" such as space rental, utilities, etc. We did not find the DOE policy unreasonable and we could not agree with the employee that he was entitled to a flat per diem. Gene Daly, B-197386, June 15, 1983.

CHAPTER 7

ACTUAL SUBSISTENCE EXPENSES

B. At duty station (7-1)

An employee who had been in an actual subsistence expense travel status requested reimbursement for drycleaning expenses incurred before the departure and after his return from his official travel. The FTR permits reimbursement of an employee's expenses on an actual subsistence expense basis only for expenses which are incurred during official travel. Since these expenses were incurred before and after the employee was in a travel status, they were not reimbursable. James E. Dorman, B-207039, March 1, 1983.

C. Types of expenses covered (7-1)

Meal provided as integral part of training (New)

Where an employee was authorized travel to attend a training conference in an HRGA and lunches were provided as an integral part of the training, her reimbursement for her actual subsistence expenses otherwise limited to $75 a day had to be reduced by the value of the lunches to the employee. Judy A. Whelan, B-207517, April 13, 1983.

Additional meals (7-1)

An employee on TDY obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on the evening of this return from TDY, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as elapsed time between meals and absence of in-flight meal service may be considered. Shawn H. Steinke, 62 Comp. Gen. 168 (1983).

Excessive meal costs (7-3)

Certain employees were authorized actual subsistence expenses for the first 30 days of their TDY assignment. The employees obtained lodging at a monthly rate and at significant savings over the average daily rate charged for other available lodging. The lodgings savings resulted in proportionally higher meal expenses than the agency anticipated, causing the agency to question the reasonableness of the employees' meal expenditures. Employees

are entitled to reimbursement only for reasonable expenses for meals, since a traveler is required to act prudently in incurring such expenses. Here, the agency had established guidelines limiting the amount that employees properly could spend on meals, and the employees' expenditures were within those guidelines. Since there was no further evidence that the meal expenses claimed were extravagant or unreasonable under the circumstances, the employees could be reimbursed for their expenditures. Social Security Administration employees--Claims for actual subsistence expenses while on temporary duty, B-208794, July 20, 1983.

Apartment costs (7-3)

An employee on TDY who lodged at the apartment of a private party was not entitled to reimbursement of the amount paid for his lodgings in the absence of evidence that the rental agreement was the result of an arm's-length business transaction between the parties, or that the expenses were otherwise reasonable and within the standards set forth in 52 Comp. Gen. 78 (1972). Andres Tobar, B-209109, December 15, 1982.

An employee, who was on a TDY assignment scheduled to last for approximately 6 months, received instructions that any apartment rented should only be on a month-to-month basis. However, he signed a 1-year lease, and when his assignment was terminated prior to the expiration of the lease term and he vacated the apartment prematurely, he forfeited a security deposit. The employee could not be reimbursed the security deposit, since the employee acted unreasonably in signing a 1-year lease in these circumstances. Jeffrey Israel, B-209763, March 21, 1983.

D. Travel to an HRGA (7-3)

An employee who was returning from TDY remained overnight in an HRGA when his connecting flight home was cancelled. Although the FTR normally precludes reimbursement for actual subsistence expenses where the HRGA is only an en route or stopover point and no official business is performed, this employee could be reimbursed for his actual expenses due to the unusual circumstances of the travel. See, FTR para. 1-8.1c. John F. Clarke, B-209764, March 22, 1983.

Meals on TDY in city of residence which is not the employee's PDY station (New)

An itinerant employee who did not regularly report to a PDY station and who maintained his residence outside commuting

distance from his duty station claimed reimbursement for his lunch and other meals on days that he commuted between his permanent residence and his TDY worksite in the same city. Since this location was an HRGA, subsistence should be paid on an actual expense basis. The agency disallowed the claims under a provision of local regulations which it interpreted as limiting the claimant to the reimbursement of costs which would not be incurred by an employee living and working at a PDY station. Though the employee pointed to provisions in the agency regulation in support of his claim, those provisions were not so clear as to require reversal of the agency determination to disallow reimbursement. John C. Sihrer, B-211244, September 27, 1983.

G. Authorized reimbursement (7-9)

Agency-established maximum (New)

An employee claimed reimbursement for meal and miscellaneous expenses incurred while attending a conference. The agency reduced the amount allowed for reimbursement on this item to a percentage of the statutory maximum actual subsistence allowance, as specified in an agency guideline. We concluded that the agency was justified in reducing the employee's reimbursement for meal and miscellaneous expenses, and that the formula used to reduce these expenses, was not arbitrary nor capricious, and so was permissible. Robert P. Trent, B-211688, October 13, 1983.

Exceeds statutory maximum (7-9)

There is no authority to waive or modify the statutory maximum for daily actual subsistence expenses. See, Milton S. Mintz, B-208473, October 20, 1982.

The Director of the USIA requested a determination that the USIA could rent accomodations for employees on TDY at a cost in excess of the statutory limitation where the use of the particular accomodations is an integral part of the employee's job and failure to provide such accomodations would frustrate the ability of the USIA to carry out its statutory mandate. Under the circumstances described by the Director, including implementing administrative safeguards, we held that the USIA could rent the accomodations as required. The costs are a necessary administrative expense of transacting official business. United States Information Agency--Excess Cost of Hotel Rooms, B-209375, December 7, 1982.

H. Agency responsibilities

Constructive travel (7-10)

An employee, prior to leaving his PDY station for his leave point, was authorized travel to two TDY stations and return. Since the authorization for TDY occurred before the departure from the PDY station, he was properly reimbursed his actual travel expenses not exceeding the constructive cost of round-trip travel by a direct usually traveled route between the PDY and TDY stations. Lawrence O. Hatch, B-211701, November 29, 1983.

I. Interruption of subsistence status

Subsistence status interrupted for personal reasons (7-11)

An employee, whose official duty station was Washington, D.C., was on TDY assignment in New York City. He took annual leave on Thursday and Friday and utilized the weekend to attend a family funeral in Denver. He returned to his TDY site on Sunday. Although the employee would be entitled to subsistence expenses for Saturday and Sunday, he is not entitled to the constructive cost of 2 days subsistence as an offset against the cost of his travel to and from Denver. William H. Tueting, B-208232, December 2, 1982.

Weekend return travel (7-11)

An employee, whose official station was Martinsburg, West Virginia, and who was performing TDY in Cincinnati, Ohio, traveled to Parkersburg, West Virginia, on the weekends for personal reasons. The employee could not be reimbursed transportation expenses on a comparative cost basis under FTR para. 1-8.4f, unless he returned to his PDY station or place of abode. During weekend travel to a location other than his residence or PDY station, his entitlement to actual subsistence expenses continued, and the fact that he actually incurred relatively few subsistence expenses did not entitle the employee to reimbursement of transportation costs incurred for personal reasons. James R. Curry, B-208791, January 24, 1983.

CHAPTER 8

TRAVEL OVERSEAS

D. Educational travel

Entitlement (8-2)

Since the entitlement to educational travel expenses under 5 U.S.C. § 5924(4)(B) is limited to travel to and from a univeristy in the U.S., an employee was not entitled to the expenses for a dependent's travel between his overseas duty station and the Munich, Germany, campus of the University of Maryland. Educational Travel Expenses, B-209292, February 1, 1983.

Indebtedness for educational travel expenses erroneously paid under 5 U.S.C. § 5924(4)(B) may not be waived, since travel and transportation expenses and allowances are specifically excluded from the waiver authority of 5 U.S.C. § 5584. The fact that section 5924 is entitled "Cost-of-living allowances," does not change the character of the travel expense payments authorized by that section. Educational Travel Expenses, B-209292, February 1, 1983.

E. Miscellaneous (8-2)

Separation travel (New)

In order for an employee to be reimbursed expenses incident to his return travel to his former place of residence, the travel must be clearly incidental to his separation and should commence within a reasonable time thereafter. An employee who resigned his position in Alaska effective October 2, 1981, notified his agency on March 2, 1982, of his intent to return to his former place of residence in the continental U.S. commencing on September 23, 1983, and who accepted employment at the location of the resigned position, did not meet the requirements for reimbursement. Consuelo K. Wassink, 62 Comp. Gen. 200 (1983).

CHAPTER 9

SOURCES OF FUNDS

B. Advance of funds (9-1)

Excessive advance (New)

Travel advances are in the nature of a loan given to an employee and should only be given when clearly necessary. Also, travel advances should be held to the minimum amount necessary, which generally will be an amount to cover a time period before a voucher can be prepared by the traveler and processed by the agency. A $28,500 advance given an employee to cover his estimated per diem for a 1-1/2-year period was clearly beyond the contemplation of the statute and regulations authorizing travel advances. William T. Burke, B-207447, June 30, 1983.

C. Contributions from private sources--18 U.S.C. § 209

Application of 18 U.S.C. § 209 to travel

Exceptions (9-3)

In Customs Service Charging User Fees To Recover Cost of Instructing Travel Agents, 62 Comp. Gen. 262 (1983), we concluded that when employees of the U.S. Customs Service participate as instructors in programs to train travel agents in U.S. Customs Service requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the U.S. Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the U.S. Customs Service pursuant to 19 U.S.C. § 1524.

The U.S. Customs Service did not possess any general statutory authority to accept and use gifts or donations for agency purposes. Thus, if the offered items were considered as donations, acceptance and use of them by the U.S. Customs Service would be precluded as an unauthorized augmentation of their appropriations. See, 16 Comp. Gen. 911 (1937). Furthermore, the airlines, schools and travel agents participating in the seminars and providing the offer of the free ticket did not appear to be eleemosynary institutions such that acceptance by the employee of the cost of transportation and accomodation would be authorized by 5 U.S.C. § 4111. Consequently, the U.S. Customs Service

proposed that acceptance be considered proper under 31 U.S.C. § 9701 authorizing agencies to charge user fees to recipients of special benefits or services.

Here, the U.S. Customs Service informally advised us that providing information to the public about procedures and requirements affecting travelers is within the scope of its authorized agency activities. The U.S. Customs Service further stated that the normal procedure for responding to inquiries is not through seminars, but by the use of pamphlets or response to questions from travelers at the U.S Customs Service clearance stations. However, here the U.S. Customs Service intended to participate at the request of the program sponsors, and it was the sponsors and the travel agents who would have primarily benefited from this activity by having the U.S Customs Service representatives present to provide responses to any inquiries that might arise following their discussions of U.S. Customs Service clearance procedures and requirements for travelers.

We had no objection to the U.S. Customs Service charging a fee for this service, even though some incidental public benefit was also served by their conduct of this activity. However, the fee recovered had to be reflective of the full cost of providing the special benefit in question, i.e., the full travel costs of the employees who provide the special benefit. We noted in this regard, that no recovery was proposed to be made for all the costs incurred while the employee was in a travel status. For example, subsistence or per diem costs (with the possible exception of accomodations) did not appear to have been included in the proposal made by the U.S. Customs Service.

CHAPTER 10

CLAIMS FOR REIMBURSEMENT

C. Records of travel and expenses

Evidence sufficiency (10-4)

The burden is on the claimant to establish the liability of the U.S. and the claimant's right to payment. Thus, a HUD employee, appealing HUD's denial of reimbursement for certain travel expenses claimed to have been incurred while on TDY could not be reimbursed for those expenses for lodging which he could not convincingly demonstrate were both actually incurred in the amount claimed and essential, both as to amount and purpose, to transacting official business. Raymond Eluhow, B-198438, March 2, 1983.

Actual subsistence

Receipt required--(10-5) Where the Foreign Service Travel Regulations require receipts for each allowable cash expenditure in excess of $15, unless it is not practicable to obtain them or unless the duties of the traveler were of a confidential nature, AID properly disallowed actual subsistence expense claims for individual meal costs in excess of $15 each in the absence of receipts therefore. William L. Stanford and Mervin L. Boyer, Jr., B-207453, December 22, 1982.

Evidence of authorization (10-8)

A DOE employee sought reimbursement for two trips on TDY which his agency denied on the basis that the travel was unauthorized. Where the first trip was supported by the employee's blanket travel authorization and statements from other employees justifying the need for the trip, that travel could be reimbursed. Absent such evidence supporting the second trip, that claim was denied. Gene Daly, B-197386, June 15, 1983.

D. Preparation of voucher (10-8)

An employee requested reimbursement for costs claimed to have been incurred for taxicab service in traveling to, and returning from, the airport. The employee refused to provide his residence address, contending that the agency had no authority to request such information. The FTR required that the employee provide his residence address with his travel voucher. Since the employee

refused to provide this information, we concluded that the agency could properly deny reimbursement for the item. Robert P. Trent, B-211688, October 13, 1983.

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OFFICE OF GENERAL COUNSEL
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CHAPTER 1

INTRODUCTION

A. RELOCATION EXPENSES UNDER 5 U.S.C. §§ 5721-5733

Statutory authority (1-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. §5723(a)(1), effective the date of enactment, to include a Presidential appointee whose appointment requires Senate confirmation and whose rate of pay equals or exceeds the minimum pay of grade GS-16.

Employees covered

Employees of the National Credit Union Administration (1-5)

The National Credit Union Administration (NCUA) is an independent agency within the executive branch of the Government. Hence, NCUA is an "Executive agency" within the meaning of 5 U.S.C. § 5721(1) (1976), and the entitlement of its employees to relocation expenses is governed by 5 U.S.C. Chapter 57, subchapter II. Edgar T. Callahan, B-210657, November 15, 1983 (63 Comp. Gen. ____).

Employees not covered

Employees paid under Title 37, U.S.C. (1-6)

A Commissioned Officer in the Public Health Service (PHS) who was separated from the officer corps and recruited to fill a Veterans Administration manpower shortage position in California, seeks reimbursement of real estate expenses for sale of his old residence in Maryland on separation and purchase of a new residence in California. As a member of a uniformed service, his pay and allowances were prescribed by Title 37, U.S. Code, which does not provide for such reimbursement. Reimbursement provisions of 5 U.S.C. §§ 5721-5733 are applicable only to civilian employees. Since the purported transfer was a separation from a uniformed service followed by a subsequent new appointment, there is no authority to reimburse real estate expenses for new appointees. Albert B. Deisseroth, 62 Comp. Gen. 462 (1983).

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CHAPTER 2

GENERAL CONDITIONS AND REQUIREMENTS

A. GENERAL REQUIREMENTS

Service Agreements

Resignation following agreement execution (2-3) (New)

Employee accepted a transfer and signed the required 12-month service agreement. He resigned after 5 months and became obligated to reimburse the Government for his relocation expenses. The fact that the employee had previously transferred in a position which gave him "transfer of function rights" back to first station did not in itself entitle him to perform the return travel at the Government's expense. An employee is required to sign and fulfill the terms of a new service agreement in connection with each permanent change of station within the continental United States. See paragraph 2-1.5a(1)(a) of the FTR. Kenneth J. Bray, B-211449, July 11, 1983.

B. TRANSFERS

What constitutes a transfer

Agency defined (2-12) (New)

The claimant transferred from a position in the Office of the Architect of the Capitol to one in the Department of Energy as a manpower shortage category appointee. There was no transfer between agencies for the purposes of 5 U.S.C. § 5724a because the Office of the Architect of the Capitol is not included within the definition of "agency" under 5 U.S.C. § 5721. Therefore, the claimant is limited to recovering the expenses allowed under 5 U.S.C. § 5723 for manpower shortage positions, and he is not entitled to the additional relocation expenses allowable under 5 U.S.C. § 5424a. Charles L. Steinkamp, B-208155, July 12, 1983.

Transfer effective date (2-12) (New)

Because regulations and amended regulations both unambiguously define "effective date of transfer," as the date an employee

reports for duty at his new official station, employee who reported for duty prior to effective date of amended regulations may not be paid increased miscellaneous expense allowance. Effective date indicated on Form SF-50 is not determinative of effective date of transfer. Robert A. Motes, B-210953, April 22, 1983.

Moves between quarters locally (2-17)

Employee, who was transferred to new official duty station 36 miles away from old station, is not entitled to relocation expenses where the agency determines that relocation of the employee's residence was not incident to the transfer of duty station. We will not upset agency's determination that employee's relocation was not incident to transfer where, although employee attempted to sell home and moved family and household goods out of residence, the record contains no evidence of employee's intention or good faith attempt to relocate closer to new duty station. Jack R. Valentine, B-207175, December 2, 1982.

Notice of Transfer

Project assignment ended (2-21) (New)

Employee who was transferred claims reimbursement for the costs of selling his residence. Since project to which employee was assigned was ended, and since agency was not able to give definite reply to inquiry concerning his next assignment, employee reasonably believed that he would be transferred and placed his house on the market. Employees may be reimbursed for expenses of sale as totality of circumstances indicates substantial compliance with requirement that there be an administrative intention to transfer an employee when real estate expenses are incurred. Lawrence C. Jackson, B-207564, November 22, 1982.

Transfers for convenience of the employee

Agency determinations (2-25) (New)

A transferred employee's entitlement to relocation expenses depends upon a determination that the transfer is not primarily for convenience or benefit of employee and the Comptroller General will not disturb an agency determination unless it is clearly erroneous, arbitrary, or capricious.

Thus, an agency determination to deny relocation expenses to a transferred employee is sustained where the agency's determination that transfer was for the employee's own convenience was based on the fact that the employee voluntarily trasferred to accept position with lower grade with no greater potential for promotion. The fact that he was competitively selected for the position is not a basis to overturn agency determination. Curtis E. Jackson, B-210192, May 31, 1983.

G. FRAUDULENT CLAIMS (2-46) (New)

See, generally, discussion of cases in CPLM Title III, Chapter 10, Part B. See also, specific index headings, Chapters 3 - 13 of Title IV, Relocation.

CHAPTER 3

TRAVEL OF EMPLOYEE AND IMMEDIATE FAMILY

A. AUTHORITIES

Statutory authorities (3-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5723(a)(1), effective the date of enactment, to include a Presidential appointee whose appointment requires Senate confirmation and whose rate of pay equals or exceeds the minimum pay of grade GS-16.

B. ELIGIBILITY

Incident to relocation

Shortage category appointment (3-2)

Travel orders of Navy civilian employee, filling a manpower shortage position, limited reimbursement for first duty station travel by privately owned automobile (POA) to the constructive cost of commercial air. Both the Federal Travel Regulations (FTR) and 2 Joint Travel Regulations (2 JTR), however, state that use of POA for such travel is advantageous to the Government. Where the applicable regulations prescribe payment the claim must be allowed, regardless of the wording of the travel orders. See FTR 2-2.3a; 2 JTR C2151(3). Dominic D. D'Abate, B-210523, October 4, 1983 (63 Comp. Gen.__).

Return from overseas assignment (3-3)

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental to separation and should commence within reasonable time thereafter. Employee who resigned position effective October 2, 1981, notified agency on March 2, 1982, of intent to return to former place of residence commencing on September 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement. Consuelo K. Wassink, 62 Comp. Gen. 200 (1983).

Break in service (3-4) (New)

Where the record does not establish that prior to an employee's reporting to his duty station there was a clear intent by the agency that relocation expenses were to be paid and that the change of duty station was to be accomplished without a break in service, there is no basis to authorize a retroactive adjustment of the employee's separation date to avoid a break in service prior to his reporting to the new duty station to permit the payment of travel relocation expenses. Greg T. Montgomery, B-196292, July 22, 1980, affirmed on reconsideration, B-196292, June 6, 1983.

Temporary employee was offered and accepted a permanent position with the Forest Service in Alaska while serving in California. The appointment was deferred due to hiring freeze of January 1981. He was then offered a temporary position in Alaska pending lifting of freeze. He resigned his position, had a break in service from March 14 to 25, 1981, and traveled at his own expense to accept the temporary appointment. After hiring freeze was lifted, employee was again offered permanent appointment. He accepted and his temporary appointment was converted to a permanent one. Claimant, because of break in service, may be reimbursed travel and transporation expenses as a new appointee in traveling to accept a temporary position at a post of duty outside the continental United States under 5 U.S.C. § 5722 (1976), even though travel authorization has not been issued. Robert E. Demmert, B-207030, September 21, 1983.

Immediate family

"Spouse"--case notes (3-6)

Occupational separation--An employee and his wife maintained separate residences for 2 years. Because separation was not due to the dissolution of the marriage and because the parties have reestablished a common household at the employee's new permanent duty station, the wife should be considered a member of the employee's household at the time of his transfer. Thus, he is eligible to receive relocation allowances for expenses incurred by his wife when she joined him at his permanent duty station. Robert L. Rogers, B-209002, March 1, 1983.

"Children"--case notes

Children under age twenty-one (3-8)

Custody after transfer

After an employee transferred to his new duty station, he was awarded custody of his brother's four children. The employee incurred travel and temporary living expenses in moving the children to his new duty station. Expenses for the childrens' travel to the new station may not be paid since they were not members of the employee's immediate family within the meaning of FTR para. 2-1.4d at the time the employee reported to his new duty station. James H. Woods, B-206456, March 25, 1983.

F. TRANSPORTATION EXPENSES

Mode of Travel, generally

Travel by more than one POV

Justification (3-19)

Personal effects--Agency properly denied employee reimbursement for use of two vehicles where employee lacked justification for use of second vehicle under paragraph 2-2.3e(a) of the Federal Travel Regulations. Either employee's or his spouse's vehicle could have transported both with luggage. Use of a second vehicle may not be justified on the basis of a general statement that the vehicles were used to transport personal belongings. Donald F. Daly, B-209873, July 6, 1983.

G. PER DIEM

Per diem not extended

Early delivery--POV shipment (3-32) (New)

Civilian employee of the Department of Defense is not entitled to additional per diem for travel by privately owned vehicle in connection with a permanent change of station from the United States to an overseas post since he has already received the maximum amount allowed under the

regulations for that portion of his travel. The fact that he left his former duty station early to deliver his autombile to the port for shipment does not permit the increase in the number of days authorized for per diem payments under the applicable regulations. Warren Shapiro, B-208590, November 24, 1982.

CHAPTER 4

MISCELLANEOUS EXPENSES

B. ELIGIBILITY

Incident to change of official station

Early reporting for duty (4-3) (New)

Because regulations and amended regulations both unambiguously define "effective date of transfer" as the date a transferring employee reports for duty at his new official station, an employee who reported for duty prior to the effective date of amended regulations may not be paid an increased miscellaneous expense allowance. Effective date indicated on Form SF-50 is not determinative of effective date of transfer. Robert A. Motes, B-210953, April 22, 1983.

G. REIMBURSABLE EXPENSES

Waterborne residence-related expenses (4-15) (New)

Sailboat

Employee may be reimbursed in connection with the occupancy of a sailboat as a residence upon transfer of station those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the connection of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b. Adam W. Mink, 62 Comp. Gen. 289 (1983).

Floathouse

Forest Service employee transferred to a new permanent duty station may be reimbursed as a miscellaneous expense the cost of setup of his floathouse as his residence to the extent it is analogous to costs incurred incident to the relocation of a mobile home. However, costs of insurance may not be reimbursed. James H. McFarland, B-209998, April 22, 1983.

Licenses

Teacher certification; course tuition fees (4-17) (New)

Under Federal Travel Regulations para. 2-3.1, miscellaneous expenses incurred because of a transfer, an employee may be reimbursed for (1) his wife's teacher certification fee as a license fee, and (2) his wife's teacher course tuition fee which was required as a condition precedent to the issuance of the teacher certification, where employee's wife had been a certified teacher in state in which old duty station was located. Donald W. Haley, B-201572, July 26, 1983.

H. NONREIMBURSABLE EXPENSES

Real estate related expenses

Option to purchase (4-21) (New)

Under a lease with an option to purchase a transferred employee forfeited the $1,000 amount paid as consideration for the option because she had not exercised the option to purchase before she was transferred. The forfeited amount may not be reimbursed as an item of miscellaneous expense, since the evidence does not establish that the transfer was the proximate cause of the forfeiture. Lillie L. Beaton, B-207420, February 1, 1983.

Commission on sale of personal property

Sale of horse and equipment (4-26) (New)

An employee on permanent change of station transfer, sold his personally owned horse and equipment, which was used in official Government business, and claims reimbursement for the cost of selling it. Reimbursement is denied since paragraphs 2-3.1(c)(1) and (9) of the Federal Travel Regulations specifically excludes from that coverage losses and costs incurred in selling personal property, and a horse has been deemed to be personal property. Richard D. Knight, B-212688, December 16, 1983.

Medical records transfer fee (4-26) (New)

Under Federal Travel Regulations para. 2-3.1, miscellaneous expenses incurred because of a transfer may be reimbursed, but those costs incurred for reasons of personal taste or preference and not required because of the move may not be reimbursed. The employee may not be allowed reimbursement of a medical records transfer fee, since transmittal fees are reimbursable only when the subject of the transmittal is a reimbursable expense, and expenses relating generally to medical arrangements of transferred employees are not reimbursable. Donald W. Haley, B-201572, July 26, 1983.

CHAPTER 5

TRAVEL TO SEEK RESIDENCE QUARTERS

E. NATURE OF TRIP

One trip

Children (5-8)

Child care expenses--Transferred employee's claim for reimbursement of child care expenses incurred at old duty station during period of spouse's house-hunting trip may not be paid since neither 5 U.S.C. § 5724(a)(2) (1976), nor Chapter 2, Part 4 of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), authorize such an entitlement. William D. Fallin, B-210468, April 12, 1983.

CHAPTER 6

TEMPORARY QUARTERS SUBSISTENCE EXPENSES

A. AUTHORITIES

Statutory authority (6-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724a(3), effective the date of enactment, to increase to 60 days the period during which temporary quarters subsistence expenses of the employee and his immediate family may be reimbursed when the new station is within the U.S. territories or possessions. It also authorizes an extention of that time up to an additional 60 days upon agency determination of compelling reasons for continued temporary quarters occupancy.

E. OCCUPANCY OF TEMPORARY QUARTERS

Occupancy incident to transfer

Occupancy caused by delay in en route travel (6-9)

Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since the employee's rights are limited by 5 U.S.C. § 5724a to an appropriate per diem allowance rather than temporary quarters expenses, for the period of actual travel en route to the new station, if agency approved. Robert T. Bolton, 62 Comp. Gen. 629 (1983). See also Chapter 3, Part G of CPLM Title IV.

Children residing apart (6-11)

Children with relatives--The consecutive 30-day maximum period for temporary quarters subsistence expenses does not run during the period that an employee is on temporary duty travel and his minor son lives with relatives. For the purpose of subsistence expenses and the 30-day limitation, the son did not occupy temporary quarters while residing with relatives, since his stay with them was not incident to

a transfer of permanent duty stations. James E. Massey, B-207123, December 14, 1982. See also Part F, "Period interrupted" (6-28) of CPLM, Title IV.

Quarters that are not temporary

Occupancy of residence at old station

Short-distance transfers (6-21) (New)

Employee, who was transferred to new duty station 36 miles from old duty station, claims subsistence expenses while occupying temporary quarters at old duty station. Employee is not entitled to payment of temporary quarters since the distance between his new official station and old residence is not more than 40 miles greater than the distance between his old official station, as required by paragraph 2-5.2h of the Federal Travel Regulations. Jack R. Valentine, B-207175, December 2, 1982.

H. REIMBURSABLE EXPENSES

Fraudulent claims (6-38) (New)

A fraudulent claim for lodgings or meals taints entire claim for an actual subsistence expense allowance for any day on which a fraudulent claim is submitted. Therefore, employee's claim for temporary quarters subsistence expenses for 30 days is denied in its entirety since employee misrepresented his actual daily lodging expenses and his daily food expenses. See decisions cited. Fraudulent Travel Voucher, B-212354, August 31, 1983.

CHAPTER 7

RESIDENCE TRANSACTION EXPENSE

SUBCHAPTER I -- ENTITLEMENT

A. AUTHORITIES

Statutory authority (7-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724a(a)(4), effective the date of enactment, to limit expenses of residence sale at old official station to 10% of sale price, not to exceed $15,000, and expenses of residence purchase at new official station to 5% of purchase price, not to exceed $7,500. Additionally, maximum dollar amount may be increased effective October 1 of each year thereafter based on percentage change in the Consumer Price Index published for December of the preceding year over the Index published for December of the second preceding year. See Part E, "Maximum Amount of Reimbursement", page 7-32 of this chapter of CPLM, Title IV.

D. TRANSACTIONS COVERED

Purchase of residential property (7-7)

Where an employee purchased two dwellings on 50 acres of land, agency should have prorated the real estate purchase expenses even though the second dwelling was not habitable. The proration requirement of paragraph 2-6.1f of the Federal Travel Regulations applies even in the case of a single dwelling where the employee purchases a parcel of land in excess of that reasonably related to the residence site. James W. Thomas, B-212326, November 29, 1983.

Forfeiture of deposit (7-11)

Employee transferred to new duty station and contracted to purchase residence there. When agency delayed establishment of new office at this duty station, employee, due to uncertainty of the situation, chose to forfeit deposit on residence. Since agency delay appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense. Marvin K. Eilts, B-212560, December 5, 1983 (63 Comp. Gen. ____).

Under a lease with an option to purchase agreement a transferred employee forfeited the $1,000 amount paid as consideration for the option because she had not exercised the option to purchase the leased residence before she was transferred. A mere right to purchase under an option does not confer title to a residence so as to justify real estate sale expenses, which in any event would not include expenses in the nature of a forfeited deposit. Lillie L. Beaton, B-207420, February 1, 1983.

Expenses paid by third party (7-11) (New)

Transferred employee seeks reimbursement of real estate expenses incurred in sale of residence at old duty station. Expenses claimed were paid by wife's employer. Since the claimed expenses were actually paid by a third party, not by the transferred employee, no entitlement to reimbursement exists under para. 2-6.1f of Federal Travel Regulations. Lawrence F. Miller, B-208817, January 18, 1983.

E. Specific conditions of entitlement

Occupancy of residence when notified of transfer

Exceptions

Successive transfers (7-17)

Employee transferred from Denver to Phoenix and then back to Denver and sold Denver residence within the 1 year from effective date of first transfer but subsequent to retransfer. Subsequent transfer does not extinguish the right to reimbursement created by the initial transfer and since real estate sale expenses were incurred prior to prospectively applicable holding in Matter of Shipp, 59 Comp. Gen. 502 (1980), reimbursement is not limited to expenses incurred prior to notice of retransfer or those which could not be avoided. Adolph V. Cordova, B-207728, January 13, 1983.

Settlement date limitation

Computation of time period

FTR amendment inception date (7-26) (New)

Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of

station on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station. The amendment to FTR para. 2-6.1e, allowing 1-year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to August 23, 1982. James H. Gordon, 62 Comp. Gen. 264 (1983); Richard J. Walsh, B-210862, June 9, 1983.

30-day grace period extension (7-26) (New)

The Federal Travel Regulations (FTR) were amended in 1982 to allow agencies to extend the 2-year period to complete residence transactions, provided the transferred employee requests an extension within 30 calendar days after the expiration of the 2-year period and the 30-day period is specifically extended by the agency. We conclude the amendment authorizes agencies to extend the 30-day period for requests on an individual basis. Hence, the Department of Health and Human Services may extend the 30-day period for an employee who was not informed of the FTR amendment or of the new time limit on requesting an extension. Sara B. Harris, B-212171, September 27, 1983.

Expenses customarily paid

Fees paid to a lender (7-27) (New)

An employee may not be reimbursed for the messenger service and tax certificate fees paid if those fees were paid to the lender in connection with the sale of employee's home at his old duty station. When the facts and documentation presented with a claim are insufficient to establish the exact nature of these fees, in the absence of more specific information, the amounts may not be reimbursed. Patrick T. Schluck, B-202243, July 6, 1983.

SUBCHAPTER II--REIMBURSABLE EXPENSES

E. TITLE EXAMINATION AND INSURANCE

Paid for by seller (7-41)

Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement for title insurance fee on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement. Roger L. Flint, 62 Comp. Gen. 426 (1983).

F. ATTORNEYS' FEES AND LEGAL EXPENSE

Rule for settlements after April 27, 1977

More than one attorney (7-44)

An employee incurred an attorney's fee for closing on a lot on which he built his residence, and another attorney's fee for a construction contract for that residence. The Federal Travel Regulations limit reimbursement to expenses comparable to those reimbursable in connection with the purchase of existing residences and does not include expenses which result from construction. Since the attorney's fee for the construction contract was incurred because he chose to build a residence as opposed to purchasing an existing one, and since he has already been reimbursed an attorney's fee for closing on the lot, he may not be reimbursed the fee for the construction contract. Robert W. Webster, B-212427, November 29, 1983 (63 Comp. Gen. ____).

Equitable title "land contracts" (7-45) (New)

An employee entered into a "land contract" for purchase of a residence and sought reimbursement for payment of related attorneys' fees. Paragraph 2-6.1c of the FTR sets out the title requirements that must be met before reimbursement of real estate expenses is authorized. A "land contract" providing for installment payments, for immediate legal possession and occupancy, and for conveyance of the deed

upon payment of the full price, vested the employee as purchaser with equitable title sufficient for reimbursement purposes. Joseph F. Rinozzi, B-206852, March 9, 1983.

G. FINANCE CHARGES

Rule following Regulation Z

Exclusions from finance charges

Second recording fee (7-53) (New)--Under para. 2-6.2d of the Federal Travel Regulations, expenses which result from construction of a residence may not be reimbursed. Since the claimant has been reimbursed the recording fee for the purchase of the lot, he cannot also be reimbursed the recording fee for construction of his new residence as that fee results from construction. Robert W. Webster, B-212427, November 29, 1983 (63 Comp. Gen. ___).

Mortgage application rejection (7-56) (New)--A transferred employee incurred expenses for a credit report and appraisal in connection with his attempt to purchase a residence at his new duty station. The employee was unable to purchase the residence since the lending institution rejected his application for a mortgage loan. Claim for the cost of the credit report and appraisal are disallowed because only expenses incurred incident to completed residence sale or purchase transactions are reimbursable real estate expenses. Paul M. Foote, B-210566, March 22, 1983.

Loan closing fee (7-56) (New)--Two transferred employees incurred finance charges in the form of loan closing fees. Although, in each instance, the lender states that the fee does not constitute a finance charge, the Government is not bound by a lending institution's characterization of a payment, but must examine the charge against Regulation Z (12 C.F.R. § 226.4 (1982)). Since there is no itemization of specific expenses included in the loan closing fees, and lump-sum loan fees generally are regarded as nonreimbursable finance charges under Regulation Z, the employees' claims may not be paid. Taylor and Keyes, B-208837, December 6, 1982; and William R. Pierson, B-209691, May 9, 1983.

Loan origination fee (7-56) (New)

Employee may be reimbursed the loan origination fee incurred incident to purchasing a house on December 1, 1982, at his new duty station since revised paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, specifically authorizes reimbursement for such a fee. Robert E. Kigerl, B-211304, July 12, 1983 (62 Comp. Gen. ____).

Effective October 1, 1982, the Federal Travel Regulations authorize reimbursement of loan origination fees for a transferred employee purchasing a house. Such a fee, however, may be reimbursed only if bona fide and only to the extent the fee does not exceed amounts customarily paid in the locality of the residence. Furthermore, the total reimbursable expense in connection with the purchase of a residence, including the loan origination fee, is subject to an overall limitation of 5 percent of the purchase price or $5,000, whichever is less. Patricia A. Grablin, B-211310, October 4, 1983. See Chapter 7, Subchapter I, Part A of this supplement of CPLM, Title IV, regarding maximum dollar amount change.

Investigating and processing fee (7-56) (New)

Tranferred employee paid a lump-sum, 1 percent investigating and processing fee of $794 on mortgage loan to lending institution in connection with purchase of residence at new duty station. While the fee was stated to be a loan origination fee, it is a finance charge within the meaning of Regulation Z (12 C.F.R. Part 226), reimbursement of which is precluded, absent itemization to show that items are excluded from the definition of a finance charge by 12 C.F.R. § 226.4(e). Harvey C. Varenhorst, B-208479, March 16, 1983; and James C. Troese, B-211107, June 10, 1983.

H. MORTGAGE PREPAYMENT COSTS

Old mortgage refinanced--new residence purchase (7-58) (New)

Transferred employee obtained money from a new mortgage on his old residence to make downpayment on purchase of residence at new official station. Buyers of old residence assumed the new mortgage, and employee used proceeds to pay off existing land con-

tract, pay closing costs, and make downpayment on residence purchased at new duty station. Transaction to primarily obtain funds to make downpayment was not an "interim personal financing loan" but a loan secured by employee's interest in old residence, and part of total financial package for purchase of new residence. Hence, expenses of mortgage determined by agency to be reasonable and customary are reimbursable. James R. Allerton, B-206618, March 8, 1983; and Charles A. Onions, B-210152, June 28, 1983.

I. TAXES

State Grantor Tax (7-60) (New)

Transferred employee may not be reimbursed for a State Grantor's Tax paid by him on behalf of a seller in connection with the purchase of a new residence. Although it may be common for a buyer to pay the Grantor's Tax, the local HUD office has determined that it is customary for the seller to pay such cost in that particular area. Christopher S. Werner, B-210351, May 10, 1983.

K. OTHER RESIDENCE TRANSACTION EXPENSES

Capital improvements (7-67) (New)

An employee was required to pay off a paving lien placed on his old residence when he sold his residence incident to his transfer. Since the paving lien was placed on the property because of improvements made to street adjacent to the property it may not be reimbursed under the Federal Travel Regulations. It is analogous to a capital improvement to the property itself, and will be treated in the same manner. V. Stephen Henderson, B-207304, April 15, 1983.

M. LEASE TRANSACTIONS

Duty to minimize termination costs

Reimbursement permitted (7-69)

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4-1/2 month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's

finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality. Norman B. Mikalac, 62 Comp. Gen. 319 (1983).

CHAPTER 8

TRANSPORTATION OF MOBILE HOMES

A. AUTHORITIES

Statutory authority (8-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724(b)(1), effective the date of enactment, to eliminate the statutory mileage rate ceiling and reframe it as a "reasonable allowance" to be administratively determined and set by the Federal Travel Regulations.

D. MOBILE HOMES SUBJECT TO SHIPMENT

New mobile home

Ownership requirement

Sailboat (8-3) (New)

An employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported. Adam W. Mink, 62 Comp. Gen. 289 (1983).

Floathouse (8-3) (New)

Forest Service employee may be reimbursed for the cost of commercially towing his floathouse to his new permanent duty station in Alaska for use as his residence under the provisions of 5 U.S.C. § 5724(b)(2), which permits the transportation of a mobile dwelling at Government expense. James H. McFarland, B-209998, April 22, 1983.

CHAPTER 9

TRANSPORTATION OF HOUSEHOLD GOODS

A. AUTHORITIES

Statutory authority (9-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5724(a)(2), effective the date of enactment, to authorize the increase of an employee's household goods and personal effects for transportation purposes to 18,000 pounds.

D. DEFINITION OF "HOUSEHOLD GOODS"

Items included (9-9) (New)

Bicycle trailer

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as a "household good" as defined in paragraph 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as a household good. Guy T. Easter, B-207967, November 16, 1982.

E. WEIGHT LIMITATION

Applicable weight limitation

Application regardless of mode of shipment (9-13)

Employee who made his own arrangements and shipped his own household goods on October 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after the fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for

excess cost if they choose to move their own household goods. However, cost of insurance must be recouped. John S. Phillips, 62 Comp. Gen. 375 (1983).

Liability for excess weight

Collection from employee (9-15)

Employee who moved his household goods incident to a transfer, knew he would be liable for excess weight charges. He claims the difference between the overweight charges as represented to him based on rates effective in May and the overweight charges actually charged under new rates effective in June when the shipment was made. The overweight charges the mover billed were correct and the mover was required by the Interstate Commerce Act to collect them. Since the Federal Travel Regulations required collecting from the employee any excess weight charges it paid, there is no basis for allowance of the claim. Theron M. Bradley, Jr., B-210561, September 13, 1983.

Employee who was transferred incident to a reduction in force may not be relieved of cost of shipping household goods in excess of his authorized weight. Although reduction-in-force action that resulted in transfer was cancelled, the Government may not incur charges for the cost of shipping goods in excess of weight authorized by 5 U.S.C. § 5724(a). Henry R. Rodoski, B-209953, May 18, 1983.

Determining weight

Evidence of weight

Weight certificates

Discrepancies (9-19)

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not mean that the Government may not claim excess

weight costs in the move; rather, a constructive shipment weight should be obtained under paragraph 2-3.2b(4) of the Federal Travel Regulations. James C. Wilson, 62 Comp. Gen. 19 (1982), affirmed on reconsideration, B-206704, August 8, 1983.

Transferred employee was assessed weight charges for 3,300 pounds over the statutory maximum household goods shipment of 11,000 pounds. The employee argues that the weight certificates were invalid because of the discrepancy between the trailer license numbers on the tare and gross weight certificates, and thus the agency was in error in paying the carrier. The discrepancy in trailer numbers, without additional evidence, does not indicate that the weight certificates were clearly in error so as to overrule the agency's determination of correctness. Claim for reimbursement of excess weight costs is denied. Norman Subotnik, B-206698, November 30, 1982.

Constructive weight

Determined by carrier (9-22)

To correct error resulting from invalidation of weight certificates the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under paragraph 2-8.2b(4) is unobtainable the weight of the shipment must be determined by other reasonable means. Here mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight. James C. Wilson, 62 Comp. Gen. 19 (1982), affirmed on reconsideration, B-206704, August 8, 1983.

G. ORIGIN AND DESTINATION OF SHIPMENT

To other than new duty station (9-27)

Employee who was transferred to new official duty station did not transport his household goods from the old station

until nearly 1 year after his transfer, when he accepted a private sector position in another location. Employee is entitled to transportation expenses since he remained in Government service for 12 months after the effective date of his transfer, and transportation of his goods was begun within the 2-year limitation period specified by paragraph 2-1.5a(2) of the Federal Travel Regulations. Reimbursement of transportation expenses to a place other than the new duty station is authorized by FTR para. 2-8.2d, with the cost limited to the constructive cost of shipping the employee's goods to the new station. William O. Simon, Jr., B-207263, April 14, 1983.

I. TRANSPORTATION WITHIN THE U.S.

Commuted-rate system

Determining method of reimbursement (9-36) (New)

Employee of Department of Energy made his own arrangements and shipped his household goods on October 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from GSA after the fact in December 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective December 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a GBL. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed. John S. Phillips, 62 Comp. Gen. 375 (1983).

Employee who was authorized shipment of household goods incident to a permanent change of station is limited to the actual expenses of that shipment in this case. Since transportation by Government Bill of Lading would have been less costly than reimbursement under the commuted rate system, 41 C.F.R. § 101-40.206 requires that reimbursement be limited to the low-cost Government mover. However, where agency failed to comply with requirement to make cost determination before shipment of household goods, employee

may be reimbursed actual expenses not to exceed the amount that would be allowable under the commuted rate system. Donald F. Daly, B-209873, July 6, 1983.

Actual expense method

Cost reimbursement limitation (9-37)

Collateral movement to storage--A transferred employee who moved his own household goods was reimbursed for actual expenses since there was insufficient documentation to pay him under the commuted rate method. He may be reimbursed the additional expense he incurred in hiring a moving company to move certain items of furniture into a loft area of his house. That expense may be reimbursed as part of the actual cost of transporting his household goods. See 48 Comp. Gen. 115 (1968). Robert D. Maxwell, B-207500, October 20, 1982.

Ancillary charges (9-38) (New)

Employee whose household goods were shipped under the actual expense method must repay Government for charge by carrier for snow removal. It is the employee's responsibility to provide the carrier access to his household goods and thus to see that his driveway is passable. Albert L. Kemp, Jr., B-209250, April 12, 1983.

CHAPTER 10

STORAGE OF HOUSEHOLD GOODS

SUBCHAPTERS I & II--TEMPORARY & NONTEMPORARY STORAGE

A. AUTHORITIES

Statutory authority (10-1)

Section 118 of Public Law 98-151, November 14, 1983, 97 Stat. 977, has amended 5 U.S.C. § 5726, effective the date of enactment, to increase the weight of household goods, and personal effects to 18,000 pounds for storage purposes.

CHAPTER 13

RELOCATION OF FOREIGN SERVICE OFFICERS AND OTHERS

D. TRANSPORTATION AND STORAGE OF EFFECTS

Origin and destination of shipment

Time limitation (13-13) (New)

The spouse of a Foreign Service officer who died while stationed in Washington, D.C., was entitled to transportation of her household effects to the place where the family will reside, but by regulation such transportation was required to take place within a maximum of 18 months after the officer's death. The widow may not be granted a further extension of time by action of the Committee on Exceptions to the Foreign Service Travel Regulations. Teresita G. Bowman, B-212278, September 2, 1983.

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